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# The Newest Member of the Nuclear Club: Pakistan's Drive for a Nuclear Weapons Capability and United States Nuclear Nonproliferation Policy

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## I. INTRODUCTION

World public opinion and United States governmental policy consider nuclear proliferation, the spread of the capability to test and produce nuclear weapons in non-nuclear weapons states (NNWS),[1] a grave threat to global peace and stability.[2] The acquisition of atomic bombs by any nation has enormous implications. The development of imbalances in military power and the creation of nuclear arms races are primary concerns. Other dangers include greater opportunities for terrorist attacks and accidental detonation, the rapid escalation of conventional armed conflict into nuclear confrontations, and the possibility that unstable and provocative national leaders would actually seek to use nuclear weapons.[3]

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1. The term nuclear proliferation has two definitions. Originally, nuclear proliferation referred solely to the actual testing and production of nuclear weapons by nations. Today, the term is more broadly defined. As used in this note, it is the spread among nations of the capability to test and produce nuclear weapons. *See* Donnelly, *Changing Pressures on the Non-Proliferation Regime*, in SIPRI YEARBOOK 1983, at 69, 74 (1983).

2. Nuclear Non-Proliferation Act of 1978, § 2, 22 U.S.C. § 3201 (1982) ("The Congress finds and declares that the proliferation of nuclear explosive devices or of the direct capability to manufacture or otherwise acquire such devices poses a grave threat to the security interests of the United States and to continued international progress toward world peace and development."). While this finding states the consensus view, a revisionist school on the dangers of proliferation does exist. *See, e.g.*, Bueno & Riker, *An Assessment of the Merits of Selective Nuclear Proliferation*, 26 J. CONFLICT RESOLUTION 283 (1982); Waltz, *The Spread of Nuclear Weapons: More May Be Better*, 171 ADELPHI PAPERS 1 (1981). Moreover, there are ever present voices proclaiming proliferation's inevitability. *See* Weltman, *Managing Nuclear Multipolarity*, INT'L SECURITY, Winter 1981/82, at 182.

3. *See, e.g.*, L. DUNN, CONTROLLING THE BOMB: NUCLEAR PROLIFERATION IN THE 1980S 176 (1982); Quester, *Introduction: In Defense of Some Optimism*, in NUCLEAR

One of the most significant developments in international nuclear

PROLIFERATION: BREAKING THE CHAIN 1, 9-12 (G. Quester ed. 1981); Shultz, *Preventing the Proliferation of Nuclear Weapons*, DEP'T ST. BULL., Dec. 1984, at 17, 18. For a classic essay on the enormity of the destructive power of atomic bombs and the challenges of the nuclear age, see Andrews, *Commandments in the Atomic Age*, in PHILOSOPHY AND TECHNOLOGY 130 (C. Mitcham & R. Mackey eds. 1983). The rate of proliferation is also a concern because the faster the rate, the lesser the chance of managing the destabilizing effects of proliferation. *U.S. Nuclear Nonproliferation Policy: Hearings Before the Senate Comm. on Foreign Relations*, 97th Cong., 2d Sess. 25 (1982) [hereinafter *U.S. Nuclear Nonproliferation Policy*] (statement of Joseph S. Nye, Professor of Government, Harvard University).

In the specific context of the Third World, the risks of nuclear proliferation are magnified. Commentators often cite the current balance of terror between the United States and the Soviet Union as evidence for the proposition that further proliferation will lead to regional balances of power around the globe. Such analysis fails to appreciate two critical factors in the United States-Soviet relationship that are not present in the Third World.

First, the political stability of governments of developing nations remains substantially lower than in the cases of the Soviet Union and the United States. Since the end of World War II, millions of people have died in the Third World in the course of revolutions, coups, assassinations, civil wars, national wars, genocide and ethnic strife. HARVARD NUCLEAR STUDY GROUP, LIVING WITH NUCLEAR WEAPONS 216-17 (1983). *See* L. DUNN, *supra*, at 69-71.

In India, more than 1,800 people were killed and 5,000 wounded in political and sectarian violence during 1987. *India Rocked by Rebellions*, Daily Advertiser (Lafayette, La.), Jan. 5, 1988, at 17, col. 1. The same year, more than 200 people were killed by bombings in Pakistan. Wall St. J., Dec. 28, 1987, at 1, col. 3. In one three day period, over 200 people were killed in random attacks by a band of armed men throughout two of Pakistan's provinces. Fineman, *Horror Grips Pakistan — Massacre Toll Reaches 210*, San Francisco Chron., Oct. 4, 1988, at A15, col. 1. *See generally* Spaeth, *Pakistan's Teeming Commercial Capital Is Beset by Violence, Inadequate Services*, Wall St. J., Dec. 30, 1987, at 8, col. 4.

The heads of state of both nations have died while in office during the 1980s. On October 31, 1984, Prime Minister Indira Gandhi of India was assassinated by two of her bodyguards, who were of followers of the Sikh religion. O'Brien, *Holy War Against India*, ATLANTIC MONTHLY, Aug. 1988, at 54, 58. On August 17, 1988, President Mohammmad Zia ul-Haq of Pakistan was killed when the Pakistani Air Force plane he was flying in exploded in mid-air. Sciolino, *Zia of Pakistan Killed as Blast Downs Plane; U.S. Envoy, 28 Others Die*, N.Y. Times, Aug. 18, 1988, at A1, col. 3. Whether the crash was the result of an aircraft malfunction or an act of sabotage was not conclusively established by the American and Pakistani investigators. *See, e.g.*, McGee, *Expert Backs Pakistan on Crash Cause*, Wash. Post, Oct. 21, 1988, at A25, col. 4; Sciolino, *Report on Zia Crash: Pakistan and U.S. View Issue With Different Prisms*, N.Y. Times, Oct. 19, 1988, at A6, col. 1; Trainor, *Malfunction Seen as Cause of Zia Crash*, N.Y. Times, Oct. 14, 1988, at A3, col. 4.

The second major reason the dangers of nuclear proliferation are magnified in the Third World is that the mere possession of nuclear weapons does not lead to deterrence; only those weapons systems which can survive a nuclear attack and return a devastating blow contribute to stability. For any nation that has developed nuclear weapons the transition from simple possession to assured second-strike capability would be precarious and could encourage a preemptive strike by a hostile neighboring state. HARVARD NUCLEAR STUDY GROUP, *supra*, at 217-18. *See* L. DUNN, *supra*, at 73. Given a 1980 Iranian attack on Iraq's Osirak research reactor and its latter destruction by Israeli warplanes on June 7, 1981, such pre-emptive strikes can no longer be considered hypothetical possibilities. *See* L. SPECTOR, NUCLEAR PROLIFERATION TODAY 174, 178 (1984). Reports surfaced in the summer of 1984 that India was considering an attack on Pakistan's nuclear facilities. Cronin, *India and Pakistan*, in LIMITING NUCLEAR PROLIFERATION 59, 78 (J. Synder & S. Wells, Jr. eds. 1985). On December 17,

politics is Pakistan reaching the threshold of possessing nuclear weapons. After its military defeat at the hands of India in 1971, Pakistan actively sought a nuclear weapons capability.[4] By 1987, according to informed commentators, Pakistan possessed all of the key components and the technical ability needed to construct nuclear weapons.[5]

An immediate and principal danger to international security from Pakistan's nuclear activities is that India might respond to this activity by integrating nuclear weapons into its armed forces, thereby igniting a nuclear arms race in South Asia.[6] Never before has there been a situa-

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1985, Prime Minister Rajiv Gandhi of India and President Zia of Pakistan pledged not to attack the nuclear facilities of either nation. Weisman, *Ghandhi-Zia Talks Said to Bear Fruit*, N.Y. Times, Dec. 18, 1985, at A3, col. 1. Yet the verbal agreement was not incorporated into a peace treaty because of the "intense mutual suspicions" between the two nations. Rao, *India, Pakistan Racing to be Last*, BULL. ATOM. SCIENTISTS, Nov. 1987, at 32, 33. *See* Ali, *The Obstacles Remain*, FAR E. ECON. REV., Mar. 12, 1987, at 35, 36. However, in December 1988, both nations signed a treaty not to attack each other's nuclear facilities. Ali, *A Hint of Hope*, FAR E. ECON. REV., Jan. 12, 1989, at 10, 10.

4. *See infra* notes 130-35 and accompanying text.

5. *Nuclear Non-Proliferation and U.S. National Security: Hearings Before the Senate Committee on Governmental Affairs*, 100th Cong., 1st Sess. 7 (1987) [hereinafter *Nuclear Non-Proliferation*] (testimony of Leonard S. Spector, Senior Associate, Carnegie Endowment for International Peace). *See, e.g.*, Crawford, *Pakistan Thought to Possess Atomic Bomb*, 235 SCI. 1131, 1131 (1987); Hevesi, *Mohammad Zia ul-Haq: Unbending Commander for Era of Atom and Islam*, N.Y. Times, Aug. 18, 1988, at A7, col. 1; Ottaway, *Pakistani A-Bomb Seen Likely*, Wash. Post, Mar. 8, 1987, at A1, col. 13.

6. Millholin, *Stopping the Indian Bomb*, 81 AM. J. INT'L. L. 593, 593 (1987). *See, e.g.*, Elkin & Ritezel, *The Indo-Pakistani Military Balance*, 26 ASIAN SURV. 518, 537 (1986); Murphy, *Pakistan and the Nuclear Issue*, DEP'T ST. BULL., Oct. 1987, at 53, 53.

The United States, Soviet Union, Great Britain, France, China and, most likely, Israel and South Africa maintain nuclear arsenals. Munro, *Knocking at the Nuclear Door*, TIME, Mar. 30, 1987, at 42, 42. India tested a nuclear device on May 18, 1974. Since that date, India has not conducted any further nuclear explosions. India has the facilities and nuclear material to produce a significant number of nuclear weapons. L. SPECTOR, *supra* note 3, at 23, 58-59.

It is disputed whether India has stockpiled nuclear weapons. The United Press International reported in 1988, based on U.S. intelligence sources, that "India has assembled a handful of highly sophisticated low-yield atomic bombs that can be delivered to targets by combat aircraft." Sale, *'City buster' Atomic Bombs Reportedly Amassed by India*, San Francisco Chron., Mar. 20, 1988, at A9, col. 1. A report prepared earlier in the year for the Carnegie Endowment for International Peace concluded that India had not deployed nuclear weapons into its armed forces. THE CARNEGIE TASK FORCE ON NON-PROLIFERATION AND SOUTH ASIAN SECURITY, NUCLEAR WEAPONS AND SOUTH ASIAN SECURITY 1 (1988) [hereinafter TASK FORCE]. However, the Task Force ominously found that:

> [i]f present trends continue, an open-ended nuclear arms race in South Asia appears inevitable; arguably it has already begun. Currently it appears that both nations would be able to manufacture atomic bombs during any crisis lasting more than several weeks and to deliver such weapons by aircraft. Momentum is building, moreover, toward further nuclearization. A critical factor is that both nations appear to be striving to accumulate nuclear weapons material free from non-proliferation controls. Thus, even if their respective nuclear weapons programs remain

tion where two nuclear-armed nations have shared a common and disputed border, a history of prior wars and high tensions, and great internal instability.[7]

A nuclear arms race in South Asia could trigger the collapse of the system of export controls on commercial nuclear technology established by the nuclear supplier nations. The nuclear facilities that both Pakistan and India have used to produce nuclear weapons have either been imported, in some cases illegally, or built with foreign designs.[8]

Following the Soviet Union's invasion of Afghanistan in 1979, the United States created a multi-billion dollar aid program for Pakistan. United States policymakers hoped this economic and military assistance would, in part, curb Pakistan's desire for a nuclear weapons capability. Within a few years, it was apparent that Pakistan's nuclear program was continuing unabated. The United States, however, decided to renew the aid package in 1987. It was perceived to be in the United States national interest to provide funds for Pakistan, despite nonproliferation concerns, in return for Pakistan's support of the Afghan rebels resisting the Soviet occupation of Afghanistan.

Today, the nuclear rivalry in South Asia poses one of the greatest challenges for United States nuclear nonproliferation policy. This Note examines the United States nuclear nonproliferation policy in regard to Pakistan, but that is not the author's sole purpose. Foreign policy decisions are not made in a vacuum. To analyze United States policy towards Pakistan it is necessary to have both a conceptual and historical understanding of the nuclear nonproliferation regime,[9] including the ef-

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undeclared, the number of weapons potentially available to each side will steadily increase in the months and years ahead. By late 1990, Pakistan could have as many as 15 Hiroshima-size devices, while India might have produced more than 100.

*Id.* at 2. *See The Subcontinent Goes Critical*, ECONOMIST, Sept. 5, 1987, at 36, 36.

7. *Nuclear Non-Proliferation*, *supra* note 5, at 8 (testimony of Leonard Spector). India and Pakistan have fought three wars since independence from Great Britain. Both nations claim the Kashmir region, of which India holds two-thirds of the total area. Both nations have also suffered from ethnic tensions and fundamental disputes involving their identity. Despite summit meetings of each nations' leaders and discussions on normalizing relations, Indo-Pakistan relations have been extremely strained throughout the 1980s. *See, e.g.*, Cronin, *supra* note 3, at 72-77. Border clashes occurred regularly between the two nations from 1983 through 1987. *High hand in High Places*, ECONOMIST, Oct. 3, 1987, at 39, 39. At the beginning of 1987 there was a "war scare" stemming from each other's military exercises. *See Nuclear Non-Proliferation*, *supra* note 5, at 192 (text of Ambassador Deane Hinton's speech of February 16, 1987).

8. *See* Millholin, *supra* note 6, at 593.

9. "A commonly accepted definition of international regimes is a set of implicit or explicit 'principles, norms, rules and decision-making procedures around which actor expectations converge in a given issue-area.'" Smith, *Explaining the Non-Proliferation Regime:*

forts of the United States. Once that is provided, a review of Pakistan's efforts to build a bomb and an analysis of the American response will follow, including a review of the 1987 battle on Capitol Hill over President Reagan's second foreign assistance package for Pakistan.

This Note argues that any United States attempt to coerce the Pakistani government not to develop nuclear weapons, by threatening a termination of United States assistance, will ultimately be counterproductive and accelerate nuclear proliferation in South Asia. A more thoughtful and productive policy for the United States would place a greater emphasis on the tensions between India and Pakistan in its foreign policy and encourage a peaceful resolution of the nuclear rivalry between both nations.

## II. A CONCEPTUAL FRAMEWORK OF THE INTERNATIONAL NUCLEAR NONPROLIFERATION REGIME

National interest dictates a nation's decisions and actions.[10] Other than specialized concerns based on the efficient functioning of international relations, it is rare for a broad range of states to formulate and abide by a shared set of commitments, obligations, rules, and practices.[11] Yet motivated by the collective fear of nuclear annihilation, the world community has established normative regulations and constraints to halt the spread of nuclear weaponry and also to further the peaceful use of commercial nuclear power.[12]

These rules and practices are embodied in the Partial Test Ban Treaty,[13] Nuclear Nonproliferation Treaty,[14] its regional facsimile the Treaty of Tlatelolco,[15] Nuclear Nonproliferation Treaty review confer-

*Anomalies for Contemporary International Relations Theory*, 41 INT'L ORG. 253, 253 (1987) (quoting Krasner, *Structural Causes and Regime Consequences: Regimes as Intervening Variables*, in INTERNATIONAL REGIMES 1 (S. Krasner ed. 1983)).

10. H. MORGENTHAU, POLITICS AMONG NATIONS 4-8 (5th ed. rev. 1978).

11. *See id.* at 280-81. "International law owes its existence and operation to two factors, both decentralized in character: identical or complementary interests of individual states and the distribution of power among them. Where there is neither community of interest nor balance of power, there is no international law." *Id.* at 282.

12. Smith, *supra* note 9, at 257.

13. Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water, *adopted* Oct. 10, 1963, 14 U.S.T. 1313, T.I.A.S. No. 5433, 480 U.N.T.S. 43 (known as the Partial Test Ban Treaty).

14. Treaty on the Non-Proliferation of Nuclear Weapons, *opened for signature* July 1, 1968, 21 U.S.T. 483, T.I.A.S. No. 6839, 729 U.N.T.S. 161 [hereinafter Nuclear Nonproliferation Treaty].

15. Treaty for the Prohibition of Nuclear Weapons in Latin America, *opened for signature*

ences held every five years,[16] the final reports of the International Fuel Cycle Evaluation,[17] the Statute of the International Atomic Energy Agency,[18] the Nuclear Supplier Group's guidelines and bilateral agreements,[19] legislation by national governments,[20] and a general worldwide concern against additional nations testing nuclear weapons.[21] Together, they form the international nuclear nonproliferation regime.[22]

The nuclear nonproliferation regime can be conceived of as operating on two levels. The first is the political level and the second is the technical and institutional level.[23] As we will see in the discussion of the history of the regime, national nuclear strategies have at varying times emphasized one level over the other. It is important first to examine how, and with what degree of success, individual nations effectuate their national strategies within the regime. Some of the key issues that must be addressed in formulating national nonproliferation policy are the concepts of sovereignty and leverage, technological capability, and certain caveats for state action.

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Feb. 14, 1967, 22 U.S.T. 762, T.I.A.S. No. 7137, 634 U.N.T.S. 281 (known as the Treaty of Tlatelolco).

16. For a summary of the Third NPT Review Conference held in the summer of 1985 and attended by 86 of the Treaty's then 130 parties, see Power, *The Mixed State of Non-proliferation: the NPT Review Conference and Beyond*, 62 INT'L AFF. 477 (1986).

17. *See infra* notes 98, 100, 113-15 and accompanying text.

18. Statute of the International Atomic Energy Agency, *opened for signature* Oct. 26, 1956, 8 U.S.T. 1093, T.I.A.S. No. 3873, 276 U.N.T.S. 3, *amended* Oct. 4, 1961, 14 U.S.T. 135, T.I.A.S. No. 5284, 471 U.N.T.S. 334.

19. *See* Donnelly, *supra* note 1, at 70-71; *infra* note 75 and accompanying text.

20. For example, see Nuclear Non-Proliferation Act of 1978, Pub. L. No. 95-242, 92 Stat. 120 (codified as amended in scattered sections of 22 and 42 U.S.C.).

21. *See* L. DUNN, *supra* note 3, at 17; NUCLEAR ENERGY POLICY STUDY GROUP, NUCLEAR POWER ISSUES AND CHOICES 288 (S. Keeny chrm. 1977).

22. *See* Nye, *Maintaining a Nonproliferation Regime*, in NUCLEAR PROLIFERATION: BREAKING THE CHAIN, *supra* note 3, at 15, 16.

The regime can claim partial credit for the fact that no nation since China in 1964 has produced and exploded a nuclear device for the avowed purpose of establishing a nuclear weapons force. *See* HARVARD NUCLEAR STUDY GROUP, *supra* note 3, at 215-216. (The Indian nuclear explosion in 1974 was described as "a peaceful nuclear explosion intended to study the cratering and cracking effects on rocks." L. SPECTOR, *supra* note 3, at 34 (footnote omitted)).

Over time, though, the nature of nuclear proliferation has changed. In the late 1960s, a second wave of proliferation commenced. No longer did nations overtly test and develop nuclear weapons. Nations such as Israel and South Africa have found their national interests better served by covertly stockpiling nuclear bombs. L. SPECTOR, *supra* note 3, at 5. *See* Donnelly, *supra* note 1, at 70-74.

23. W. WALKER & M. LÖNNROTH, NUCLEAR POWER STRUGGLES 18 (1983).

## A. Sovereignty And International Regulation[24]

The nation-state is the basic political unit and highest law-giving authority in the world political system, except for a unanimous vote of the permanent members of the United Nations Security Council.[25] After the Organization of Arab Petroleum Exporting Countries (OAPEC) oil embargo of 1973-74 and the dramatic rise in oil prices, many states, including Pakistan, saw the construction of nuclear reactors for the generation of electricity as the only alternative to dependency on imported oil.[26] To receive commercial nuclear power technology and materials, the Nuclear Nonproliferation Treaty (NPT) requires all NNWS to forswear the manufacture of nuclear weapons and to accept International Atomic Energy Agency (IAEA) safeguards.[27] IAEA safeguards consist of regular inspection and the auditing of nuclear materials passing through nuclear facilities.[28] The line between necessary restrictions and undue infringement of national autonomy is not always clear. This partially explains why the NPT has not been accepted by all nations.[29]

## B. Leverage and Technological Capability

The ability of the United States to influence another nation's nuclear

24. Sovereignty refers to the existence of a central nation-state exercising lawmaking and law-enforcing authority within its territory. H. MORGENTHAU, *supra* note 10, at 315.

25. *See* U.N. CHARTER arts. 39, 41, 42, 51; H. MORGENTHAU, *supra* note 10 at 316-17; J. SWEENEY, C. OLIVER & N. LEECH, CASES AND MATERIALS ON THE INTERNATIONAL LEGAL SYSTEM 1294, 1304 (3d ed. 1988). It is important to note that the United Nation's recent successes in regional conflicts "owe much to an unprecedented new spate of diplomacy among the five permanent members of the U.N. Security Council." Serrill, *Peace on the March*, TIME, Sept. 26, 1988, at 34, 35.

26. Ebinger, *International Politics of Nuclear Energy*, 57 WASH. PAPERS 7, 49 (1978). (Only the Arab states within the Organization of Petroleum Exporting Countries participated in the 1973-74 oil embargo). *See* Stobaugh, *World Energy to the Year 2000*, in GLOBAL INSECURITY 29, 29 (1982) ("Observers predicted that the very large increases in oil prices in 1973-74 would speed the development of nuclear power; indeed, Western leaders made nuclear power the cornerstone of their national energy plans.").

27. The Nuclear Nonproliferation Treaty, *supra* note 14, arts. II-III.

28. *See infra* note 59 and accompanying text.

29. *See, e.g.*, W. WALKER & M. LÖNNROTH, *supra* note 23, at 10; Nye, *NPT: The Logic of Inequality*, FOREIGN POL'Y, Summer 1985, at 123, 126 ("Argentina, Brazil, India, Israel, Pakistan, and South Africa . . . have rejected the NPT. They consider it unacceptably discriminatory and hypocritical for the superpowers to maintain weapons denied to other states."); Quester, *Preventing Proliferation: The Impact on International Politics*, in NUCLEAR PROLIFERATION: BREAKING THE CHAIN, *supra* note 3, at 213, 214-15. The above quotation is not entirely correct in regard to Pakistan. Pakistan is not philosophically opposed to the NPT; rather, it refuses to sign as long as India maintains a nuclear option. A STAFF REPORT TO THE SENATE COMM. ON FOREIGN RELATIONS, 100TH CONG., 2D SESS., NUCLEAR PROLIFERATION IN SOUTH ASIA: CONTAINING THE THREAT 7 (Comm. Print 1988) [hereinafter STAFF REPORT].

policy—the concept of leverage—depends upon a group of factors including the following: level of technological capability, scientific infrastructure, governmental stability, perceived security needs, economic well-being, and political relationships.[30]

Leverage can be a double-edged sword. No nation desires to be excessively dependent on another nation and the exercise of such domination can spur indigenous programs and self-reliance.[31] For example, United States technological dominance in the 1960s allowed it to monopolize the European and Japanese commercial nuclear energy markets. It was only a matter of time before the Europeans and Japanese developed their own technologies after the United States frequently exploited its position of dominance.[32]

In the Third World, United States opposition can delay, but not indefinitely prevent, a nation that has a moderately developed scientific infrastructure and is politically committed from developing a nuclear weapons capability.[33] Where a nation has a limited scientific base, as in

30. *See, e.g.*, OFFICE OF TECHNOLOGY ASSESSMENT, NUCLEAR PROLIFERATION AND SAFEGUARDS SUMMARY 10-12 (Mar. 1982). It is estimated that 30 to 40 nations will have the capability to construct a nuclear weapon by the year 2000. HARVARD NUCLEAR STUDY GROUP, *supra* note 3, at 221-22. But only a handful of these nations will choose to construct nuclear weapons. The primary motivations to attain a weapons capability are security and, to a lesser extent, prestige. Goheen, *Problems of Proliferation: U.S. Policy and the Third World*, 35 WORLD POL. 194, 206-07 (1983). Most nations with the capability have no intention to build nuclear weapons. Their security needs are either satisfied by an alliance with a nuclear weapons state or their own conventional forces, and the status incentive is not present. HARVARD NUCLEAR STUDY GROUP, *supra* note 3, at 221. *See, e.g.*, L. DUNN, *supra* note 3, at 11-14; NUCLEAR ENERGY POLICY STUDY GROUP, *supra* note 21, at 287.

31. Smith & Rathjens, *Reassessing Nuclear Nonproliferation Policy*, 59 FOREIGN AFF. 875, 892 (1981). In addition, policymakers would be well advised to appreciate that highly confrontational demands breed opposition and are ultimately unsuccessful. History is filled with such examples. The XYZ Affair of 1797-98 between France and United States should have been on the minds of Deputy Secretary of State Warren Christopher and Vice President Walter Mondale during their visit to Brazil in early 1977. The United States negotiating team's "arrogant behavior" only exacerbated tensions over the German-Brazilian fuel cycle technologies transfer. Ebinger, *supra* note 26, at 65.

32. *See* Ebinger, *supra* note 26, at 38-39; Nye, *supra* note 22, at 20. The preeminent position of the United States has deteriorated to the point that Japan is now becoming the world's center for commercial nuclear reactor technology. Walker & Lönnroth, *Proliferation and Nuclear Trade: A Look Ahead*, BULL. ATOM. SCIENTISTS, Apr. 1984, at 29, 31.

33. *See* HARVARD NUCLEAR STUDY GROUP, *supra* note 3, at 220 ("Eventually, governments with a reasonable technical infrastructure that are strongly committed to get hold of weapons-grade uranium or plutonium will probably be able to do so, though the process may take considerably longer than they initially expect.").

Scientists in most nations today can design a nuclear device. However, nations with a strong desire to construct nuclear weapons face the great technological problem of gaining possession of sufficient nuclear explosive material. Either uranium-235 or plutonium-239 can be used for the core of a nuclear device. Neither of these materials is found in nature. They

the case of Libya, cutting off technology can be effective.[34] In some situations, however, it may result in the loss of influence and temporarily strengthen local "pro-bomb" advocates.[35]

As nuclear capabilities spread and American influence on international energy and security policies diminishes,[36] the political dimension of nuclear proliferation assumes a pivotal role.[37] Technical approaches such as export embargoes, and institutional solutions—principally IAEA safeguards—are fundamental components of the nonproliferation regime. Alone, however, these measures can not halt proliferation since the decision to manufacture a nuclear weapon is essentially a political one.[38]

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can only be produced through two different methods: uranium enrichment or plutonium reprocessing. *Id.* at 219-20; L. SPECTOR, *supra* note 3, at 426-27.

Before enrichment, natural uranium contains 0.7 percent uranium-235. Weapons grade uranium must usually be "enriched" to over ninety percent uranium-235 at an uranium enrichment facility. Given the great complexity of the process and the enormous expense of these facilities, experts considered uranium enrichment as a less likely path to proliferation than obtaining plutonium-239. Nevertheless, Argentina, South Africa, and Pakistan have constructed uranium enrichment plants. L. SPECTOR, *supra* note 3, at 427.

A nation must have a nuclear reactor to produce plutonium. While the reactor is operating, the uranium is bombarded by neutrons which transform some of the uranium fuel into plutonium-239. The "spent" fuel is then chemically treated at a reprocessing plant to separate the plutonium from the residual uranium and other radioactive byproducts. *Id.* at 429. *See* HARVARD NUCLEAR STUDY GROUP, *supra* note 3, at 220.

34. Goheen, *supra* note 30, at 210. *See* L. SPECTOR, *supra* note 3, at 161-62 ("Libya has made little progress towards developing a nuclear capability, however, largely because of its technological skills are limited and many nations are reluctant to provide it with nuclear aid."). In 1984, the Reagan Administration convinced the Belgian government to cancel an agreement for nuclear cooperation with Libya worth over one billion dollars. *Nuclear Contract Lost*, AFR. REP., Jan.-Feb. 1985, at 44, 44.

35. After analyzing the Pakistani-United States relationship, one commentator concluded that "the case of Pakistan chiefly seems to show . . . that pressures, controls, and denials are unable to stop a country that has both the scientific skills and the political determination to acquire nuclear weapons — unless, perhaps, such a country feels a heavy security dependence on the United States." Goheen, *supra* note 30, at 203-04.

36. *See* Nacht, *The Future Unlike the Past: Nuclear Proliferation and American Security Policy*, in NUCLEAR PROLIFERATION: BREAKING THE CHAIN, *supra* note 3, at 193, 209.

37. *See* Shultz, *supra* note 3, at 18 ("America no longer dominates the nuclear field — scientifically or commercially — as it once did. As mastery of the technology has spread, it has been harder to persuade others simply to follow our lead, let alone dictate their actions and choices. Now more than ever, a successful nonproliferation effort requires cooperative undertakings involving both suppliers and users of nuclear technology, taking into account their energy needs, commercial interests, and concerns about their sovereignty."). *See, e.g.*, OFFICE OF TECHNOLOGY ASSESSMENT, *supra* note 30, at 10; NUCLEAR ENERGY POLICY STUDY GROUP, *supra* note 21, at 286-91.

38. *See* OFFICE OF TECHNOLOGY ASSESSMENT, *supra* note 30, at 10; Bolet, Ebinger, Pilat & Pendley, *Atoms for Peace After Thirty Years*, VI SIGNIFICANT ISSUES SERIES 31-32 (1984) (remarks of Lawrence Scheinman of Cornell University); Gummett, *From NPT to INFCE: Developments in Thinking About Nuclear Non-Proliferation*, 57 INT'L AFF. 549, 562-63 (1981).

## C. Caveats to State Action

It is important to emphasize that specific constraints on any nation's nonproliferation policy exist. First, general approaches must be adapted to individual nations. It is unrealistic and potentially counterproductive, to apply a blanket nonproliferation policy uniformly to all nations. All nations have unique histories, security interests, nuclear motivations, capabilities, and political situations.[39] For example, the construction of a reprocessing plant in Japan would not evidence a covert program to obtain nuclear explosive—or fissile—material, whereas with Pakistan it would.

The second constraint on nonproliferation policy is that proliferation consists of many steps. Joseph Nye, the architect of President Carter's policy, speaks of proliferation as being a "staircase" with each step requiring a specific response.[40] The purchase of commercial nuclear power plants might be the first step. Or a nation might construct facilities for the production of fissile material followed by the testing of an atomic bomb. Eventually, the nation may decide to continue testing nuclear weapons and deploy a nuclear weapons force.[41]

The third caveat to nonproliferation policy concerns the unpredictability of even the near future. President Kennedy envisioned the possibility that there would be fifteen to twenty-five nuclear weapons states by the 1970s.[42] Chance is certainly one of the elements that contributed to the slow rate of proliferation and the nonuse of nuclear weapons after 1945.[43] The Iraqi use of chemical weapons in its war against Iran illustrates how decades of restraint and international convention can evaporate overnight.[44] High interest rates, world recession, low electricity demand, falling oil prices, and skyrocketing construction costs all left the most respected predictions in the 1970s of the nuclear industry's growth worthless by the mid-1980s.[45]

The last caveat is that nonproliferation policy competes with other foreign policy objectives. In the mid-1970s, several circumstances com-

39. *See, e.g.*, Gummett, *supra* note 38, at 565-67; Schlesinger, *Forward*, in LIMITING NUCLEAR PROLIFERATION, *supra* note 3, at ix, x-xi; Smith & Rathjens, *supra* note 31, at 892.

40. Nye, *supra* note 22, at 33.

41. *See* L. DUNN, *supra* note 3, at 139; HARVARD NUCLEAR STUDY GROUP, *supra* note 3, at 224-25.

42. *See* HARVARD NUCLEAR STUDY GROUP, *supra* note 3, at 215.

43. *See* L. DUNN, *supra* note 3, at 23.

44. *See* L. SPECTOR, *supra* note 3, at 184.

45. *See* Stobaugh, *supra* note 26, at 47-50. In the United States, there has not been a new order for a nuclear power plant that was not later canceled since 1974. Davidson, *Nuclear power: Worst May be Yet to Come*, San Francisco Exam., Nov. 29, 1987, at A16, col. 1.

bined to make nonproliferation one of the highest United States foreign policy priorities. India's successful nuclear test in 1974 shattered the United States government's laissez-faire nuclear export policy. The 1973-74 oil embargo contributed to widespread expectations of an expanded role for the peaceful use of nuclear power. Supplier nations signed contracts with developing countries for facilities that could have provided those countries with fissile material.[46]

By the end of the decade, a worsening adversarial relationship with the Soviet Union, highlighted by the Soviet invasion of Afghanistan in 1979, led to a shift in United States foreign policy priorities. Previous Carter Administration goals of conventional arms restraint, discouragement of security commitments in the Third World, and ostracism of nations engaged in nuclear weapons proliferation gave way to a reaffirmation of the United States defense treaty with Pakistan by President Carter and an offer of 400 million dollars in economic and military aid.[47]

## III. HISTORY OF THE REGIME AND UNITED STATES POLICY

### A. 1945 to 1973

After the Baruch Plan failed, the history of the international nuclear nonproliferation regime from 1945 to 1973 occurred in two stages; first, the creation of a United States monopoly and embargo of nuclear technology; and second, the promotion of nuclear power coupled with safeguards.

#### 1. The Baruch Plan

On June 14, 1946, United States Ambassador Bernard Baruch offered before the United Nations Atomic Energy Commission to surrender United States nuclear technology to an International Atomic

46. *See, e.g.*, L. DUNN, *supra* note 3, at 32-33; Bolet, Ebinger, Pilat & Pendley, *supra* note 38, at 10-11; Nye, *supra* note 22, at 18-19.

47. *See, e.g.*, L. SPECTOR, *supra* note 3, at 85; Lellouche, *Breaking the Rules Without Quite Stopping the Bomb: European Views*, in NUCLEAR PROLIFERATION: BREAKING THE CHAIN, *supra* note 3, at 39, 39; Smith & Rathjens, *supra* note 31, at 884; Van Hollen, *Mrs. Gandhi, the General, and the Bomb*, WASH. Q., Spring 1981, at 157, 160.

In his State of the Union message to Congress, President Carter stated that "[t]he changed security situation in South Asia arising from the Soviet invasion of Afghanistan calls" for renewed aid to Pakistan, "[b]ut this in no way diminishes our commitment to work to prevent nuclear weapons proliferation, in Pakistan or elsewhere." Annual Message to the Congress, 16 WEEKLY COMP. PRES. DOC. 114, 172 (Jan. 21, 1980).

Development Authority which would manage, control and inspect all atomic activities from the mining of uranium to the operation of atomic reactors and the conduct of atomic research and development.[48] The Soviet Union rejected the plan and the United States responded by sealing off access to its atomic research, technology and materials to the rest of the world.[49] Congress codified this wall of secrecy in the Atomic Energy Act of 1946.[50] The policy of secrecy and denial did not work; the Soviet Union detonated an atom bomb in 1949 and Great Britain followed in 1953.[51]

2. "Atoms For Peace"

In an address to the United Nations on December 8, 1953, President Eisenhower ushered in a new era in nuclear politics by unveiling the "Atoms for Peace" program.[52] "Atoms for Peace" reversed the United States policy of denial and established the direction of American nuclear exports for the next twenty years. President Eisenhower specifically called for the creation of an International Atomic Energy Agency (IAEA) operated under the aegis of the U.N. The IAEA would promote the peaceful use of atomic power, with a special mission "to provide abundant electrical energy in the power-starved areas of the world."[53]

"Atoms-for-Peace" was a genuine effort by President Eisenhower to counter the threat of nuclear war.[54] Simultaneously, it served United States economic and political interests by positioning the United States to

48. *See* United States Atomic Energy Proposals (presented to the United Nations Atomic Energy Commission by Bernard Baruch, June 14, 1946), *reprinted in* CONG. RES. SERVICE, 96TH CONG., 2D SESS., NUCLEAR PROLIFERATION FACTBOOK 13, 13-14 (Joint Comm. Print 1980) [hereinafter FACTBOOK].

49. Lellouche, *supra* note 47, at 40. The proposal failed because the Soviet Union insisted that the United States first destroy its nuclear weapons before the Authority was established and the United States refused. *See* M. MANDELBAUM, THE NUCLEAR QUESTION 25-26 (1979); W. WALKER & M. LÖNNROTH, *supra* note 23, at 6.

50. Atomic Energy Act of 1946, 60 Stat. 755 (amended 1954). The main provisions of the Act stipulated that:

> the government obtained title to all nuclear facilities in which fissionable nuclear materials could be manufactured and became the sole proprietor of all fissionable materials. The act classified as secret all information regarding the utilization of fissionable materials for the generation of commercial nuclear power and prohibited all U.S. nationals, including the scientific community, from sharing with other nations any technical data concerning the use of atomic power for industrial purposes.

Ebinger, *supra* note 26, at 10.

51. *See* W. WALKER & M. LÖNNROTH, *supra* note 23, at 6-7.

52. Address by President Eisenhower Before the United Nations General Assembly (Dec. 8, 1953), *reprinted in* FACTBOOK, *supra* note 48, at 24, 24.

53. *Id.* at 29.

54. Bolet, Ebinger, Pilat & Pendley, *supra* note 38, at 5.

dominate the global development of commercial nuclear power.[55] As codified by the Atomic Energy Act of 1954, the program assisted foreign nations in the peaceful use of nuclear power as long as they accepted safeguards and agreed not to divert the research and nuclear materials for military purposes.[56] The potential contradictions between the promotion of nuclear energy and proliferation were not realized until much later.[57]

The IAEA was established in 1957 with the twin aims of promoting the peaceful and safe development of atomic energy and ensuring that the assistance provided by the Agency was not used for any covert activity.[58] Until the mid-1960s, its role in the regime was minor.[59] Soviet acceptance of international safeguards and a rethinking about the dangers of proliferation transformed the Agency and led to the Nuclear Nonproliferation Treaty.[60]

### 3. Nuclear Nonproliferation Treaty

The Nuclear Nonproliferation Treaty (NPT) is the cornerstone of the nuclear nonproliferation regime. It divides the world into two groups of nations: those nations that had tested a nuclear weapon before 1967, nuclear weapons states (NWS), and those nations which had not, nonnuclear weapons states (NNWS).[61]

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55. Ebinger, *supra* note 26, at 13.

56. *See* Pub. L. No. 83-703, 68 Stat. 919 (1955) (amended 1978); W. WALKER & M. LÖNNROTH, *supra* note 23, at 10.

Research reactors were supplied to many nations and the United States signed bilateral agreements of nuclear cooperation with over forty nations between 1955 and 1958. W. WALKER & M. LÖNNROTH, *supra* note 23, at 10-11. Pakistan never signed a bilateral agreement with the United States although it did receive through the IAEA a United States manufactured research reactor. In addition, 20 Pakistani scientists were trained in the United States. Bolet, Ebinger, Pilat & Pendley, *supra* note 38, at 23.

57. *See* Nye, *supra* note 22, at 17.

58. Statute of the International Atomic Energy Agency, *supra* note 18, art. II.

59. The Agency initially concentrated on health and safety concerns associated with nuclear energy and provided technical and research assistance. Large scale nuclear power production was still on the drawing boards and it took time to implement safeguards. *See* W. WALKER & M. LÖNNROTH, *supra* note 23, at 14-15; Ebinger, *supra* note 26, at 13. Today, IAEA safeguards comprise a system of on-site inspections, physical inventories and audits. L. SPECTOR, *supra* note 3, at 434. *See* W. WALKER & M. LÖNNROTH, *supra* note 23, at 10. The IAEA has over 110 member states and conducted nearly 2,000 inspections at over 500 facilities in 1985. *See Nuclear Non-Proliferation*, *supra* note 5, at 215-217 (statement of Hans Blix, IAEA Director General to the United Nations).

60. *See* W. WALKER & M. LÖNNROTH, *supra* note 23, at 15-16, 120-22.

61. L. SPECTOR, *supra* note 3, at 437. The United States, the Soviet Union, Great Britain, France, and China had exploded a nuclear weapon prior to 1967. *Id.* France and China have never signed the NPT, though France pledged to behave as if it were a party. China in 1983 announced that it would require IAEA safeguards on all its future nuclear exports. *Id.* at 439.

Article I requires that all NWS agree not to transfer or assist any NNWS in acquiring a nuclear weapon.[62] NNWS in Article II undertake not to receive or manufacture a nuclear weapon and in Article III agree to place all of their nuclear facilities under IAEA safeguards, known as "full scope" safeguards.[63] Article IV states that all parties to the treaty shall have the right to the fullest possible exchange of nuclear technology.[64] NNWS are promised access to the potential benefits of any peaceful applications of nuclear explosions in Article V.[65] Under Article VI each party to the treaty pledges to pursue negotiations in good faith to end the nuclear arms race.[66]

The survival of the NPT has always been in question because of four serious weaknesses. The first weakness concerns the nature of the executive agent of the treaty, the IAEA. IAEA "full scope" safeguards stipulated in Article III are designed to provide a "timely detection" if a diversion of nuclear material has occurred. The system is similar to a burglar alarm. As such, the safeguards act as a deterrent to any diversion, but they do not prevent a clandestine nuclear program.[67]

Although 139 nations have ratified the NPT, a second weakness of the treaty is that nations posing the greatest proliferation risks are nonsignators: India, Pakistan, Argentina, Brazil, South Africa, and Israel. Other potential proliferators, Iraq and Libya, could withdraw from the treaty in three months.[68] Third, the NPT accepts a static, two-tiered structure of the world. While this inequality is acceptable to almost all nations, NPT rejectionist states refuse to forsake the prerogative to manufacture nuclear weapons when the five recognized NWS expand their

62. Nuclear Nonproliferation Treaty, *supra* note 14, art. I.

63. *Id.* arts. II-III. In addition, exporters of nuclear technology and material usually insist that their items be placed under IAEA safeguards even if the recipient nation is not a party to the NPT. The result is that 96 nations have agreed to safeguards which cover over 95% of the nuclear facilities outside the five NWS. Miller, *Stemming the Spread of Nuclear Weapons*, TECH. REV., Aug.-Sept. 1987, at 68, 70.

64. Nuclear Nonproliferation Treaty, *supra* note 14, art. IV.

65. *Id.* art. V.

66. *Id.* art. VI.

67. HARVARD NUCLEAR STUDY GROUP, *supra* note 3, at 230-31; Ebinger, *supra* note 26, at 13-14. "[T]he IAEA is not an international police agency with broad authority to search for missing materials and prevent, rather then just detect, diversion. In a world of sovereign states, it would be unrealistic to expect any international organization to be granted such powers." Miller, *supra* note 63, at 72. Fourteen facilities are known to be operating in five nations that are not parties to the NPT: Argentina, India, Israel, Pakistan, and South Africa. *Id.* at 70.

68. *See* L. DUNN, *supra* note 3, at 144-46; L. SPECTOR, *supra* note 3, at 8; Ebinger, *supra* note 26, at 44.

weapons forces in violation of the spirit of Article VI.[69] Last, conflicts have arisen between NNWS pledges not to develop nuclear weapons and the agreement by NWS to provide commercial nuclear power technology to NNWS.[70]

### B. Organization of Arab Petroleum Exporting Countries (OAPEC) Oil Embargo Through Ford Administration

The events of 1973-75 shook the international nuclear nonproliferation regime. Western nations reacted to the OAPEC oil embargo of 1973-74 by drafting plans that called for huge expansions in nuclear power production. In May 1974, India exploded a nuclear device. In 1975, France and West Germany signed a series of bilateral contracts with Third World nations for the construction of nuclear power plants. France and West Germany "sweetened" their deals by also agreeing to sell plutonium reprocessing and nuclear enrichment plants, so-called "sensitive technologies" because of their production of fissile material. Brazil was to receive enrichment and reprocessing technologies and facilities from West Germany. South Korea and Pakistan were to buy reprocessing facilities from France.[71]

Proponents presented reasonable arguments for these sales. The United States reliability as a supplier of enriched uranium was seen by foreign nations as quite low.[72] Plutonium reprocessing would help manage nuclear waste, improve the efficient use of scarce uranium in existing reactors, and pave the way to a new generation of breeder reactors using plutonium as their fuel.[73] Critics maintained that the facilities had no economic justification and would provide these nations with fissile material.[74]

President Ford responded to these events by calling a Nuclear Suppliers Group to convene in London. Consisting of Western and Soviet

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69. *See supra* note 29 and accompanying text.

70. Bolet, Ebinger, Pilat & Pendley, *supra* note 38, at 29-30. For example, Libya has certainly had its Article IV rights violated, justified by evidence of a desire to possess nuclear weapons, a breach of Article II. *See supra* note 34 and accompanying text.

71. *See supra* notes 26, 46 and accompanying text. South Korea, after the United States threatened to terminate its security guarantees, decided to forego plutonium reprocessing. *See* HARVARD NUCLEAR STUDY GROUP, *supra* note 3, at 223. Despite United States pressure, West Germany and Brazil refused to cancel their agreement. L. DUNN, *supra* note 3, at 33.

72. *See* Ebinger, *supra* note 26, at 40-41, 55. No doubt reinforcing this view, the United States closed its order books for future sales of enriched uranium in 1974 because of fear of excessive demand. *See* Nye, *supra* note 22, at 20.

73. *See* NUCLEAR ENERGY POLICY STUDY GROUP, *supra* note 21, at 319-21; Lellouche, *supra* note 47, at 52-53.

74. *See* NUCLEAR ENERGY POLICY STUDY GROUP, *supra* note 21, at 294-97.

Bloc nations, including non-NPT party France, the Nuclear Suppliers Group agreed not to export any nuclear materials or equipment without IAEA safeguards and to exercise restraint in future sales of enrichment and reprocessing facilities.[75]

Alarmed at the events of 1973-75 and at the apparent acquiescence of the Ford Administration to the French-Pakistani deal, Congress intervened with passage of the Symington Amendment.[76] The Symington Amendment added section 669 to the Foreign Assistance Act of 1961. It mandated a cutoff of United States military and economic assistance to any nation that exported or imported nuclear reprocessing or enrichment facilities, unless that nation accepted full-scope IAEA safeguards.[77]

One year later, the Glenn Amendment revised the Symington Amendment. The Glenn Amendment created section 670 in the Act to separate the provisions relating to enrichment from the language on reprocessing and to include new language on the detonation of nuclear weapons.[78] The Glenn-Symington Amendments, in turn, were amended by the International Security and Development Cooperation Act of 1981 to add Congressional vetoes by concurrent resolution and to provide a separate and strengthened subsection on the testing of nuclear devices.[79]

Section 669 governs transfers of nuclear enrichment technologies and contains two subsections. The first subsection states that no funds under the Foreign Assistance Act may be provided to any nation that on or after August 4, 1977 delivers or receives nuclear enrichment equipment, materials, or technology from another country, unless before deliv-

75. HARVARD NUCLEAR STUDY GROUP, *supra* note 3, at 226; L. SPECTOR, *supra* note 3, at 78, 447-50. The group also developed a special "trigger list" of items whose export is not permitted unless special licenses are issued and the recipient nation agrees to IAEA safeguards on the facility using these items. L. SPECTOR, *supra* note 3, at 332-34. For a copy of the guidelines, see *U.S. Plutonium Use Policy: Hearings Before the Subcomms. on Arms Control, International Security and Science, and on International Economic Policy and Trade of the House Comm. on Foreign Affairs*, 99th Cong., 1st Sess. 11-13 (1985).

The Nuclear Suppliers Group was modeled after the Zangger Committee. The Zangger Committee was established by exporters or potential exporters of commercial nuclear technology and materials after the NPT came into force to define the procedures and standards that they would apply to nuclear transfers to non-nuclear weapons states. L. SPECTOR, *supra* note 3, at 446-47.

76. L. SPECTOR, *supra* note 3, at 79.

77. International Security and Arms Export Control Act of 1976, Pub. L. No. 94-329, § 305, 90 Stat. 729, 755-56 (1976) (current version at 22 U.S.C. §§ 2429-2429a (1982 & Supp. IV 1986)).

78. International Security Assistance Act of 1977, Pub. L. No. 95-92, § 12, 91 Stat. 614, 620-21 (1977) (current version at 22 U.S.C. §§ 2429-2429a (1982 & Supp. IV 1986)).

79. International Security and Development Cooperation Act of 1981, Pub. L. No 97-113, § 737, 95 Stat. 1519, 1562-64 (1981) (current version at 22 U.S.C. §§ 2429-2429a (1982 & Supp. IV 1986)).

ery the supplier and recipient countries place these items under multilateral auspices when available and the recipient country enters into a full scope safeguards agreement with the IAEA.[80]

The second subsection has two key provisions. First, the President can waive the cutoff if he certifies in writing to Congress that the termination of such assistance will have a "serious adverse effect on vital United States interest[s]" and "he has received reliable assurances that the country in question will not acquire or develop nuclear weapons."[81] Second, if within thirty calendar days after receiving certification Congress disapproves of furnishing assistance by a concurrent resolution, the certification will cease to be effective and all aid will end.[82]

Section 670 of the Foreign Assistance Act regulates plutonium reprocessing transfers and the receipt or use of nuclear weapons by foreign nations. Subsection (a) stipulates that no funds under the Act may be provided to any country which on or after August 4, 1977 delivers or receives nuclear reprocessing equipment, materials, or technology from any other country, except as part of an international examination of alternatives to pure plutonium reprocessing in which the United States participates.[83] The President may continue aid if he certifies that "termination of such assistance would be seriously prejudicial to the achievement of United States nonproliferation objectives or otherwise jeopardize the common defense and security."[84] Congress can nullify the certification, however, by a concurrent resolution disapproving of a resumption of assistance.[85]

Subsection (b) of section 670 states that no United States assistance may be provided to any nation which "(A) transfers a nuclear explosive device to a non-nuclear-weapon state, or (B) is a non-nuclear-weapon state and either — (i) receives a nuclear explosive device, or (ii) detonates a nuclear explosive device."[86] The President may, for not more than thirty days of continuous session, furnish assistance that would otherwise be cut off if he transmits to Congress "a certification that he has determined that an immediate termination of assistance to that country would be detrimental to the national security of the United States."[87] Aid could

80. 22 U.S.C. § 2429(a) (1982).
81. *Id.* § 2429(b)(1).
82. *Id.* § 2429(b)(2)(A).
83. 22 U.S.C. § 2429a(a)(1)(A) (Supp. IV 1986). An amendment was added to § 2429a(a)(1) in 1985 that will be discussed later in the article.
84. 22 U.S.C. § 2429a(a)(2) (1982).
85. *Id.* § 2429a(a)(3).
86. *Id.* § 2429a(b)(1).
87. 22 U.S.C. § 2429a(b)(2)(A) (1982).

not continue past the thirty day period unless approved by a joint resolution of Congress and upon the same Presidential certification as contained in section 670(a).[88]

A comparison between the cutoff provisions of sections 669 and 670(a) reveals that the language of section 669 relating to nuclear enrichment transfers is less restrictive than the language of section 670(a) concerning reprocessing transfers. Nuclear enrichment transfers will not trigger termination of United States assistance to the nations engaged in the exchange if the recipient nation agrees to place the enrichment components, along with all its nuclear fuel and facilities, under IAEA safeguards.[89] Section 670(a) does not contain a similar exemption. The only exception to a cutoff for receipt or delivery of reprocessing technology is if the transfer is part of an international effort, in which the United States participates, to find alternatives to plutonium reprocessing.[90]

The stricter language on plutonium reprocessing reflects the thesis held in Congress and by the Ford and Carter Administrations that plutonium reprocessing posed significant dangers to the nonproliferation regime.[91] As a practical matter, the broader exception of Section 669 will probably never be applied. A nation seeking weapons capability and importing enrichment technology would not agree to full scope IAEA safeguards in order to avoid an aid cutoff. The nations posing the greatest proliferation risks today have rejected the Nuclear Nonproliferation Treaty and operate nuclear facilities not subject to IAEA safeguards.[92]

Ironically, the experience with Pakistan has proven the Presidential certification provision of section 669 to be more rigorous than the provision contained in section 670(a). To override an aid cutoff triggered by a nuclear enrichment transfer, the President must certify to Congress both that the termination of aid would have serious adverse affects on vital United States interests and that he has received "reliable assurances" that the recipient nation is not developing nuclear weapons.[93] To continue United States assistance after a nuclear reprocessing transfer, the President need only certify that United States interests would be seri-

88. 22 U.S.C. § 2429a(b)(3) (1982).

89. 22 U.S.C. § 2429(a) (1982).

90. 22 U.S.C. § 2429a(a)(1) (Supp. IV 1986).

91. *See* J. PILAT & W. DONNELLY, THE REAGAN ADMINISTRATION POLICY FOR PREVENTING THE FURTHER SPREAD OF NUCLEAR WEAPONS: A SUMMARY AND ANALYSIS OF OFFICIAL STATEMENTS CRS-95 (Congressional Research Service Report No. 83-94 S, May 6, 1983); L. DUNN, *supra* note 3, at 33; Smith & Rathjens, *supra* note 31, at 877.

92. *See supra* notes 67-69 and accompanying text.

93. 22 U.S.C. § 2429(b)(1) (1982).

ously prejudiced by an aid cutoff.[94] Because the Reagan Administration could not receive "reliable assurances" from the government of President Zia-ul Haq that Pakistan was not developing nuclear weapons, the Administration was forced to request from Congress specific waivers of section 669 in 1981 and 1987 as part of its two aid packages for Pakistan.[95]

Sections 669 and 670(a) grant Congress the authority to revoke a Presidential certification by concurrent resolution. A concurrent resolution is a form of legislative veto. It requires only that both chambers of Congress approve the legislation before the legislation becomes law. By virtue of the Supreme Court's holding in *Immigration and Naturalization Service v. Chadha*, the concurrent resolutions are undoubtedly unconstitutional.[96] Even so, Congress could refuse to appropriate aid in subsequent fiscal years.[97]

*Chadha* does not affect section 670(b), relating to the receipt or use of a nuclear device, because the section does not contain a legislative veto. The section itself limits the President's authority to override an aid cutoff. Congress determined that a transfer of an atomic device to or explosion by a NNWS would be so grave an event that the President can only delay the cutoff of assistance for thirty days. After thirty days, the aid would automatically expire. It could only be restored if the President certified to Congress that termination of assistance would be seriously prejudicial to United States interests and both houses of Congress approved the assistance.[98]

Under pressure from Congress after the passage of the Symington Amendment and faced with criticism from presidential candidate Jimmy Carter, President Ford in October 1976 announced that the United States would defer the reprocessing and recycling of plutonium from civilian nuclear power plants.[99] The decision sent shock waves throughout

94. 22 U.S.C. § 2429a(a)(2) (1982). One of the purposes of the Glenn Amendment, which modified the waiver language of the Symington Amendment, was "to toughen the provisions dealing with reprocessing transfers." S. REP. NO. 195, 95th Cong., 1st Sess. 30 (1977).

95. *See* TASK FORCE, *supra* note 6, at 129-30. *See also infra* notes 180-81, 226 and accompanying text.

96. 462 U.S. 919 (1982). *See* Note, *Nuclear Nonproliferation Legislation After Chadha: Nonjusticiable Political Questions and the Loss of the Legislative Veto*, 37 SYRACUSE L. REV. 899, 900-01 (1986).

97. Cronin, *supra* note 3, at 79; Note, *supra* note 96, at 917.

98. 22 U.S.C. § 2429a(b)(2)-(3) (1982). *See* L. SPECTOR, *supra* note 3, at 93, 365 n.73.

99. CONGRESSIONAL RESEARCH SERVICE, 96TH CONG., 1ST SESS., LEGISLATIVE HISTORY OF THE NUCLEAR NONPROLIFERATION ACT OF 1978, at 917, 919 (1979) [hereinafter LEGIS. HIST.] (Oct. 28, 1976 statement of President Ford on United States nuclear energy policy). President Ford's statement followed a recommendation of a Ford Foundation study. NUCLEAR ENERGY POLICY STUDY GROUP, *supra* note 21, at 333.

nuclear programs worldwide. If commercial reprocessing was not economic in the world's largest nuclear power producing state, it was absurd for Pakistan.[100] European and Japanese policymakers feared that the United States was seeking to sabotage their plans for plutonium reprocessing and development of breeder reactors.[101]

## C. Carter Administration

In April 1977, President Carter announced his Administration's policies on proliferation and nuclear power. The United States would now indefinitely defer commercial reprocessing and recycling of plutonium and continue to embargo the export of enrichment and reprocessing technology. President Carter also called for the establishment of an international fuel cycle evaluation (INFCE) to deal with nuclear problems.[102]

Depicted as a bold shift in policy, the Carter program actually represented a continuation of the Ford policy. President Carter added a sense of urgency to nonproliferation issues. This benefit, however, was diluted by contradictory and confusing Administration statements and antagonism generated with Western allies and Third World nations on nuclear issues.[103] The Carter Administration focused its attention "on preventing the spread of the technical capabilities necessary to produce nuclear weaponry, [in particular plutonium reprocessing,] and proffered technical measures "fixes" to reduce the dangers of proliferation."[104] The Administration can claim success for the creation of a de facto ban on the future export of enrichment and reprocessing facilities by supplier nations, which is still in effect. Praise for this effort must be qualified since it was the result of economic and other political reasons as much as Carter policy.[105]

The INFCE was at the heart of the Carter policy. Sixty-six nations came together from 1978 to 1980 to analyze the technical issues of com-

100. Ebinger, *US Nuclear Non-proliferation Policy: The Pakistan Controversy*, 8 FLETCHER F. 1, 16 (1979). *See* Betts, *India, Pakistan and Iran* in NONPROLIFERATION AND U.S. FOREIGN POLICY 83, 102 (J. Yager ed. 1980); Cronin, *supra* note 3, at 69.

101. Ebinger, *supra* note 26, at 60-61.

102. LEGIS. HIST., *supra* note 99, at 937, 937-38 (Apr. 7, 1977 statement of President Carter on nuclear power policy).

103. Lellouche, *supra* note 47, at 47-49. *See also* Clausen, *U.S. Nuclear Exports and the Nonproliferation Regime* in LIMITING NUCLEAR PROLIFERATION, *supra* note 3, at 183, 192-95; Smith & Rathjens, *supra* note 31, at 880-85.

104. J. PILAT & W. DONNELLY, *supra* note 91, at CRS-89.

105. Lellouche, *supra* note 47, at 48-49.

mercial nuclear power.[106] The Administration hoped that a consensus could be reached on the risks involved in plutonium reprocessing, thereby muting opposition and criticism of United States policy.[107]

Before the first plenary conference of the INFCE convened, the United States enacted the Nuclear Non-Proliferation Act (NNPA) of 1978.[108] The Act was a compromise between provisions meant to strengthen United States reliability as a supplier of commercial nuclear technology and materials and requirements imposing severe unilateral conditions on American nuclear exports.[109]

Title I states that it shall be United States national policy to take such action as necessary for the United States to provide a reliable supply of nuclear fuel.[110] Title II commits the United States to strengthen the IAEA safeguards system.[111] Title III amends the Atomic Energy Act of 1954 by requiring an export license, based upon certain statutory criteria, for United States nuclear assistance and supplies.[112] Among the criteria for an export license, Section 305 of Title III provides that the recipient nation pledge not to use the United States material for the development of a nuclear explosive device, not to reprocess or transfer United States-supplied fuel without prior approval, and to place all of their peaceful nuclear activities under IAEA safeguards.[113] Last, the Act imposed upon the President the obligation to renegotiate all existing nuclear cooperation agreements to make them conform with the Act's export criteria.[114]

The NNPA was a clear effort by Congress to constrain the executive branch's discretion in formulating nonproliferation policy[115] and to reshape the Western World's nuclear energy activities.[116] The demand to retroactively revise nuclear cooperation agreements generated opposi-

106. Nye, *supra* note 22, at 24-25.

107. *See id. See also Nuclear Proliferation: The Situation In Pakistan And India: Hearings Before the Senate Subcomm. on Energy, Nuclear Proliferation and Federal Services of the Senate Comm. on Governmental Affairs*, 96th Cong., 1st Sess. 8 (1979) [hereinafter *Situation in Pakistan*] (prepared statement of Thomas Pickering, Asst. Secretary of State for Oceans and Int'l Environmental and Scientific Affairs); Gummet, *supra* note 38, at 553-55.

108. Pub. L. 95-242, 92 Stat. 120 (codified as amended in scattered sections of 22 and 42 U.S.C.)

109. Smith & Rathjens, *supra* note 31, at 878.

110. 22 U.S.C. § 3221 (1982).

111. *Id.* § 3241.

112. 42 U.S.C. § 2155(a) (1982).

113. *Id.* § 2156.

114. *Id.* § 2153c.

115. L. SPECTOR, *supra* note 3, at 37.

116. *Cf.* W. WALKER & M. LÖNNROTH, *supra* note 23, at 146-48. Canada and the United States "unilaterally applied further restrictions [than contained in the Nuclear Suppliers'

tion worldwide[117] and seriously undermined any opportunity to reach a consensus at the INFCE.

The glaring contradiction between compelling renegotiation and strengthening United States reliability as a supplier of nuclear materials actualized when President Carter sought to ship United States nuclear fuel to India, which refused to accept full-scope safeguards, after the period for renegotiation of nuclear cooperation agreements expired in 1980. Under a 1963 agreement, the United States was obligated to provide fuel to India. President Carter exercised special waiver provisions of the Act to permit the fuel export. Although the House strongly voted to override the waiver, the Senate barely approved the President's waiver and the fuel shipments were permitted.[118]

When the final reports of the INFCE were issued in 1980, support existed for almost every type of nuclear program. For example, the INFCE concluded that recycling plutonium in existing reactors was not economical, but nations which decided to do so were perfectly justified in using plutonium reprocessing as a means for supply self-sufficiency.[119] Although the INFCE failed to produce a global consensus on the United

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Guidelines] to their exports and tried to persuade other suppliers to fall into line, so that a coherent restrictive regime could be established." *Id.* at 146.

President Carter signed NNPA on March 10, 1978 and commended the legislation as taking "a major step forward in clarifying our Nation's [nonproliferation] policy." LEGIS. HIST., *supra* note 99, at 908, 908 (Remarks of President Carter on Mar. 10, 1978 at the bill signing ceremony). One year earlier though, President Carter stated that the new criteria for United States nuclear exports "could force an immediate moratorium on U.S. nuclear exports, adversely affecting" nuclear relations with United States allies. *Id.* at 942, 943 (Apr. 28, 1977 message of President Carter on the proposed Nuclear Non-Proliferation Act of 1977).

117. W. WALKER & M. LÖNNROTH, *supra* note 23, at 39; Goheen, *supra* note 30, at 210. In addition to the perception that the United States was seeking to unilaterally rewrite the "rules" of the commercial nuclear trade, many nations which had nuclear cooperation and supply agreements with the United States objected to NNPA because they had been assured by the Carter Administration that these agreements would not be disrupted during the INFCE. *See Situation In Pakistan*, *supra* note 107, at 9 (prepared statement of Thomas Pickering).

118. L. SPECTOR, *supra* note 3, at 39, 350 n.57; Clausen, *supra* note 81, at 196. *See* President's Message to Congress Transmitting Executive Order on Export of Special Nuclear Material and Components to India, 16 WEEKLY COMP. PRES. DOC. 1137 (June 19, 1980).

Subsequently, it became clear the United States could no longer provide nuclear fuel to India because of mounting Congressional opposition. India threatened to terminate the 1963 agreement and remove its reactors from IAEA safeguards. The deadlock was broken in 1982. France agreed to serve as a substitute supplier of nuclear fuel and India agreed to maintain IAEA safeguards and not reprocess the spent fuel. L. SPECTOR, *supra* note 3, at 39-40; Goheen, *supra* note 30, at 198-200. For an analysis of possible future legal conflict between the United States and India when the bilateral nuclear cooperation agreement expires in 1993, see Millholin, *supra* note 6, at 593.

119. Gummet, *supra* note 38, at 558-59. Moreover, no one nuclear fuel cycle was seen as less or more resistant to proliferation. *Id.* at 561.

States positions, it was beneficial in fostering a greater understanding of the dangers of proliferation.[120] Yet in America, the Iranian crisis and the Soviet invasion of Afghanistan overshadowed the final reports. During the last year of President Carter's term, nonproliferation assumed a lower foreign policy priority compared to countering Soviet aggression and perceived strategic interests in South Asia.[121]

### D. Reagan Administration

President Reagan established his Administration's nonproliferation policy for his entire term of office in a speech delivered on July 16, 1981. The speech delineated "basic guidelines" for United States policy:[122]
(1) prevent the spread of nuclear weapons was a fundamental national security and foreign policy objective;
(2) strive to reduce the motivation for acquiring nuclear weapons and promote regional and global stability and the legitimate security needs of other states;
(3) continue to support adherence to the NPT and work to strengthen the IAEA safeguards system;
(4) continue to inhibit the transfer of sensitive nuclear material, equipment and technology and to seek full-scope IAEA safeguards as a condition on new nuclear supply commitments;
(5) reestablish the United States as a reliable nuclear trading partner under adequate safeguards; and
(6) cooperate with other nations by not inhibiting foreign commercial reprocessing and breeder reactor development "in nations with advanced nuclear power programs where it does not constitute a proliferation risk."[123]

In October 1981, President Reagan released a statement on domestic nuclear power with implications for nonproliferation policy. President Reagan lifted the indefinite ban on commercial reprocessing activities in the United States and strongly endorsed commercial use of plutonium in nuclear power generation and the development of breeder reactor technology.[124]

Some commentators maintained that the Reagan nonproliferation

120. *See* Nye, *supra* note 22, at 25.
121. Clausen, *supra* note 103, at 195-96. *See supra* note 47 and accompanying text.
122. President's Statement on Nuclear Nonproliferation Policy, 17 WEEKLY COMP. PRES. DOC. 768, 769 (July 16, 1981).
123. *Id.* at 770.
124. President's Statement Announcing a Series of Policy Initiatives, 17 WEEKLY COMP. PRES. DOC. 1101, 1102 (Oct. 8, 1981).

policy constituted a fundamental shift from the Carter policy.[125] Actually, despite the wide differences between the two administrations in style and on certain substantive policy issues, the Reagan Administration generally subscribed to the basic United States nonproliferation policy in place since the last year of the Ford Administration: withholding the transfer of sensitive nuclear technologies and refusing to cooperate in nuclear trade relations, except under full-scope safeguards.[126] Furthermore, the impact of the two administrations on the nonproliferation regime has been similar. Except for Egypt and North Korea, which ratified the NPT in 1981 and 1988 respectively, the same nations that were considered proliferation risks in 1980 are still considered the greatest risks: India, Pakistan, Israel, South Africa, Argentina, and Brazil.[127]

On domestic issues, President Reagan's encouragement of nuclear power did not aide the industry. By 1987, power companies were avoiding nuclear energy,[128] and notwithstanding President Reagan's October

125. *See, e.g.* Cross & Smith, *The Reagan Administration's NonProliferation NonPolicy*, 33 CATH. U.L. REV. 633, 640 (1984).

126. W. WALKER & M. LÖNNROTH, *supra* note 23, at 155 ("Fundamentally, US policy therefore remains one of denial, of refusal to co-operate except under the strictest terms and with its most reliable allies, of confrontation with transgressors. A stronger element of pragmatism may have crept in, but it has not moved far from the Carter administration's position at the end of its stay in office."). *See* COMMITTEE ON INTERNATIONAL SECURITY & ARMS CONTROL, NUCLEAR ARMS CONTROL: BACKGROUND AND ISSUES 237 (National Academy of Sciences, 1985) [hereinafter COMMITTEE].

127. *See* COMMITTEE, *supra* note 126, at 266.

Many factors help explain this statement. First, the nature of the problem ensures a fair degree of continuity in United States nonproliferation policy. *See* HARVARD NUCLEAR STUDY GROUP, *supra* note 3, at 227-28. The initial Carter policy changed by the end of his term. *See supra* note 121 and accompanying text. Congressional opposition to many Reagan proposals was stiff and Congress successfully altered or defeated many of them. W. WALKER & M. LÖNNROTH, *supra* note 23, at 154. In turn, the Reagan Administration policies evolved to include a greater recognition of the risks of proliferation. Schlesinger, *supra* note 39, at x; W. WALKER & M. LÖNNROTH, *supra* note 23, at 154. Of course, President Reagan himself, while seeking the Republican nomination for the presidency in 1980, said that he did not think foreign countries' developing their own nuclear weapons was "any of our business." Lindsey, *Reagan Says America Should Not Bar Others From A-Bomb Output*, N.Y. Times, Feb. 1, 1980, at A12, col. 6.

Another factor explaining why the impact of the two administrations on the nonproliferation regime has been substantially the same is that the NNPA is the cornerstone of American nonproliferation policy and greatly limits executive branch action. *See U.S. Nuclear Nonproliferation Policy*, *supra* note 3 at 17 (testimony of James Devine, Deputy Assistant Secretary of State for Nuclear Energy and Energy Technology). Last, poor economics of nuclear power, the Third World debt, and the Chernobyl disaster have reversed the fortunes of nuclear energy around the world. *See id.* at 25 (statement of Joseph Nye); Clausen, *supra* note 81, at 201-02; Davidson, *Nuclear Power Haunted by Chernobyl's Fallout*, S.F. Examiner, Dec. 1, 1987, at A1, col. 1.

128. *Going for Broke*, ECONOMIST, Oct. 3, 1987, at 32-33.

1981 statement, it was the policy of the Department of Energy not to pursue commercial plutonium reprocessing and breeder reactor development.[129]

In terms of nonproliferation policy, the major elements of the Reagan policy were a case-by-case review of each nation, strengthening the United States as a reliable supplier, approving plutonium reprocessing in certain nations, and using a carrot and stick policy to curb proliferation.

While it was easy to criticize the Reagan Administration as not having a nonproliferation policy,[130] this characterization was based upon the philosophy that a uniform nonproliferation policy was necessary.[131] The NNPA codified this view and the Carter Administration preferred to treat all nations alike. The Reagan Administration policy discriminated in its treatment of foreign nations based upon the proliferation risks present. Differences with the Carter policy should not be overemphasized since the Carter policy was subject to many exceptions and was arguably abandoned by the end of President Carter's term.[132]

It has been longstanding policy for the United States to provide a reliable source of nuclear fuel and technology so that the United States can further its nonproliferation goals.[133] The Carter Administration emphasized reliable supply, but only to those nations that would agree to the export restrictions of the NNPA. The Reagan Administration did not ask Congress to amend the Act.[134] Instead, it used loopholes in the NNPA to sell or allow sales of United States nuclear exports to safeguarded facilities in NPT rejectionist states.[135]

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129. *Nuclear Non-Proliferation*, *supra* note 5, at 45 (testimony of Ambassador Richard Kennedy). At the close of the Reagan Administration, defense-related spending accounted for 60% of the Department of Energy budget. Even research programs in advanced commercial nuclear reactors were sacrificed for "Star Wars" research and military nuclear projects. Woutat, *Defense to Remain Focus at Energy Dept.*, Los Angeles Times, Jan. 13, 1989, pt. IV, at 1, col. 1.

130. For such a view, see Cross & Smith, *supra* note 125, at 633 n. 1.

131. Interview with Dr. Charles K. Ebinger, Director of the Energy Analysis Group, International Resources Group, in Washington, D.C. (Oct. 21, 1988) [hereinafter Ebinger Interview].

132. *See* COMMITTEE, *supra* note 126, at 239-41; J. PILAT & W. DONNELLY, *supra* note 91, at CRS-90; Clausen, *supra* note 103, at 194-96.

133. *See* LEGIS. HIST., *supra* note 99, at 919 (Statement of President Ford).

134. J. PILAT & W. DONNELLY, *supra* note 91, at CRS-90, 96-97.

135. *See* Cross & Smith, *supra* note 125, at 650-55. Notably, the Reagan Administration permitted Westinghouse to sell technical services to South Africa's Koeburg reactor and allowed West Germany to transfer 143 tons of United States origin heavy water to Argentina. The Administration argued that these and other transfers to nations not accepting full-scope IAEA safeguards would improve the environment for nonproliferation and serve as inducements to wider application of safeguards. L. SPECTOR, *supra* note 3, at 215-16, 302-03, 336.

The Congressional reaction to these sales was hostile. In 1984, both house of Congress approved amendments to the Export Administration Act to close the loopholes in the NNPA which permitted the controversial transfers.[136] Congress failed to pass the Export Administration Act in 1984. By the time it was signed into law a year later, the Act no longer included provisions restricting United States nuclear exports.[137] Over time, the Reagan Administration, for the most part, chose not to exploit the loopholes in the NNPA and adhered to the position that nonproliferation restrictions required by governments were essential to national security interests and the "long-term stability of nuclear trade."[138]

The most striking difference between the Reagan and Carter policies centered on their attitudes toward plutonium reprocessing. For the Carter Administration, expanded plutonium reprocessing posed grave dangers to the nonproliferation regime.[139] In his July 1981 statement, President Reagan announced that the United States would not inhibit reprocessing in economically advanced nations that posed no risk of proliferation.[140] Furthermore, "programmatic" approval was given to Sweden and Norway in 1983, and later to Japan, to reprocess United States origin spent fuel for thirty years without review or renegotiation by the United States.[141] The differences should not be exaggerated between the two Administrations because the Carter Administration had been moving toward a programmatic approval formula with Japan and Western Europe in 1980.[142]

The final major element of the Reagan nonproliferation policy was

136. L. SPECTOR, *supra* note 3, at 336-37.

137. *Congress Renews Export Administration Act*, 41 CONG. Q. ALMANAC 259-60 (1985).

138. McGoldrick, *Problems of Assurance of Nuclear Supplies*, DEP'T ST. BULL., Sept. 1987, at 48, 48-51.

139. J. PILAT & W. DONNELLY, *supra* note 91, at CRS-94-95; Clausen, *supra* note 103, at 197-98.

140. *See supra* note 123 and accompanying text.

141. *See* Proxmire, *Congress Must Act on Proliferation*, BULL. ATOM. SCI., Mar. 1985, at 32, 33; 133 CONG. REC. H9841-42 (daily ed. Nov. 9, 1987) (letter from President Reagan to Congress).

The controversy surrounding the agreements with Sweden and Norway centered upon whether allowing thirty-year blanket approval for plutonium reprocessing was in violation of Section 401 of the Nuclear Non-Proliferation Act. The section stipulates that no bilateral nuclear agreements shall be undertaken unless the cooperating party guarantees that no material transferred pursuant to the agreement shall be "reprocessed, enriched or . . . otherwise altered in form or content without the prior approval of the United States." 42 U.S.C. § 2153(a)(7) (1982). Critics of the administration argued that "prior approval" meant prior approval was needed by the United States each time a nation chose to reprocess spent fuel. *See* Note, *supra* note 96, at 899.

142. J. PILAT & W. DONNELLY, *supra* note 91, at CRS-96; Clausen, *supra* note 103, at 198.

the use of a carrot and stick policy. The theory was that offers of economic and military aid (carrots) could improve the security of NNWS and reduce their motivations to obtain a nuclear weapons capability. Otherwise, the United States would impose economic sanctions and embargo nuclear technology exports (the sticks).[143] For Pakistan, the policy failed. Pakistan accepted American arms and economic aid while aggressively pursuing the nuclear weapons option.[144]

## IV. PAKISTAN'S DRIVE FOR A NUCLEAR WEAPONS CAPABILITY

### A. Key Factors in Pakistan's Decision to Pursue a Nuclear Weapons Capability

The Pakistani nuclear program is primarily a response to its hostility with India. India has four times the population of Pakistan and is militarily and economically superior to Pakistan. Three wars between India and Pakistan have scarred the period since independence in 1947 and the combatants still share a disputed border.[145] Pakistanis believe that if India has a nuclear bomb, Pakistan must have one also.[146] Moreover, the Pakistani nuclear program receives great support from the general population.[147]

For the near future, it appears to be in Pakistan's self-interest not to test a nuclear device. Over the last several years, Pakistan has quietly become the third largest United States foreign aid recipient, behind Israel

143. *See* Note, *Nuclear Non-Proliferation for the 80s: Carrot and Stick Policy Reexamined*, 13 BROOKLYN J. INT'L. L. 25, 26-27 (1987). The military assistance percentage of United States foreign aid dramatically increased under the Reagan Administration. Military programs grew to over one-third of total obligations for the first time in 1982 and for 1986 they represented 38%, or $6 billion, of the United States aid program. *Trends in Foreign Aid 1977-86: Study Prepared by the Foreign Affairs and National Defense Division, Congressional Research Service for the House Select Committee on Hunger*, 99th Cong., 2d Sess. 5-6 (1986).

144. *See* TASK FORCE, *supra* note 6, at 46; Marwah, *India and Pakistan: Nuclear Rivals in South Asia*, in NUCLEAR PROLIFERATION: BREAKING THE CHAIN, *supra* note 3, at 165, 179.

145. *See* R. HARDGRAVE, JR., INDIA: GOVERNMENT AND POLITICS IN A DEVELOPING NATION 240-43 (3d ed. 1980); TASK FORCE, *supra* note 6, at 25-33, 38-40; *Gandhi's Visit to Pakistan Raises Hopes of Better Ties*, Star Tribune (Minneapolis-St. Paul, Minn.), Dec. 29, 1988, at 6A, col. 4; Hussain, *Why Pakistan Needs a Nuclear Option*, Wash. Post, Jul. 29, 1987, at A10, col. 1.

146. W. DONNELLY, PAKISTAN AND NUCLEAR WEAPONS CRS-6 (Cong. Res. Ser. Issue Brief 86110, Aug. 12, 1987). For detailed examinations of the presumed benefits and potential disadvantages of a nuclear armed Pakistan and India, see TASK FORCE, *supra* note 6, at 56-68; STAFF REPORT, *supra* note 29, at 15-17.

147. STAFF REPORT, *supra* note 29, at 16. *See* Haqqani, *The Perils of Open Diplomacy*, Wall St. J., May 5, 1987, at 36, col. 4.

and Egypt.[148] An ambiguous program avoids a United States aid cutoff that would be required under the Foreign Assistance Act of 1961 if Pakistan tested a nuclear device.[149] While threats of an aid cutoff have not halted Pakistan's program, United States aid has been one factor in deterring Pakistan from testing a nuclear device.[150]

Irrespective of the possibility of a United States aid cutoff, an overt nuclear posture by Pakistan could unite India, Iran, and the Soviet Union to take action against Pakistan. India is far superior to Pakistan in nuclear technologies and would certainly move to integrate nuclear weapons into its armed forces.[151] Consequently, it appears that Pakistan is following the Israeli model of proliferation: developing a weapons capability and, one day, stockpiling nuclear bombs without openly declaring their possession or testing them.[152]

## B. History of the Pakistani Nuclear Effort and the United States Response

### 1. Early History of Pakistan's Nuclear Program

Pakistan's nuclear program began in 1955 with the creation of a committee of scientists to advise the government on nuclear matters. From this committee, the Pakistan Atomic Energy Commission was founded in 1956. Under "Atoms-for-Peace," Pakistani scientists were trained in foreign universities and nuclear research facilities and Pakistan

148. Madison, *The Pakistan Conduit*, 1987 NAT'L J. 1773, 1773.

149. W. DONNELLY, *supra* note 146, at CRS-6.

150. STAFF REPORT, *supra* note 29, at 11. *See* Haqqani, *supra* note 147, at 36.

151. W. DONNELLY, *supra* note 146, at CRS-6; L. SPECTOR, *supra* note 3, at 104-05.

A significant factor which may also contribute to Pakistan's decision not to test a nuclear device is the possibility that Pakistan does not need to test nuclear weapons because it has reportedly received tested designs from China. *See* Albright, *Bombs Without Test Blasts?*, BULL. ATOM. SCIENTISTS, June 1987, at 32, 32.

On April 27, 1987, the Indian Minister of Defense told Parliament that "[t]he emerging nuclear threat to us from Pakistan is forcing us to review our options." 133 CONG. REC. S6219 (daily ed. May 8, 1987). *See India Reviewing Nuclear Policy*, N.Y. Times, Oct. 28, 1987, at A6, col. 5.

Of course, India's security concerns are not solely a function of Pakistan's nuclear activities. Underlying India's insistence on maintaining a nuclear-weapons option are potential nuclear threats from China to anxieties about American and Soviet intervention in South Asia, coupled with India aspirations to be a regional superpower. TASK FORCE, *supra* note 6, at 2.

152. *Nuclear Non-Proliferation*, *supra* note 5, at 14 (testimony of Leonard Spector). This statement assumes Israel has not tested nuclear weapons. A great controversy exists, beyond the purposes of this note, as to whether Israel and South Africa tested a nuclear device in the South Atlantic in 1979. For a discussion of the issue, see L. SPECTOR, *supra* note 3, at 299-300, 453-57; Gaffney, *Prisoners of Fear: A Retrospective Look at the Israeli Nuclear Program*, AM.-ARAB AFF., Fall 1987, at 75, 90-92.

received a small United States-made research reactor supplied by the IAEA.[153]

Kanupp, Pakistan's first, and to date only, nuclear power reactor, began operations in 1972. The Canadian-supplied reactor uses natural uranium as its fuel. The reactor produces an estimated fifty-five kilograms of plutonium each year and is under IAEA safeguards. Kanupp has never operated at full capacity due to Canada's cutoff of technical assistance and fuel, which followed Pakistan's refusal to agree to full-scope IAEA safeguards.[154]

Although the IAEA declared in September 1981 that it could not guarantee that diversions from Kanupp were not occurring and the IAEA did not believe the safeguards at the reactor were functioning properly until 1983, experts doubt any diversions of spent fuel took place.[155] Instead, Pakistan obtained fissile material through its own production of highly enriched uranium.

### 2. The Role of Zulfikar Bhutto and Pakistan's Two Track Approach To Nuclear Weapons Capability

The father of the Pakistani bomb was Zulfikar Bhutto.[156] From the outset of Pakistan's nuclear program to his ouster from power in 1977, Bhutto dominated Pakistan's nuclear decision-making process.[157] Under Bhutto's guidance, Pakistan refused to sign the Nuclear Nonproliferation Treaty, linking its decision to India's refusal to sign the treaty.[158] The actual Pakistani decision to develop a nuclear bomb, however, predated

153. *See* L. Spector, *supra* note 3, at 70-71.

154. *Id.* at 71, 81, 95. *See* Ebinger, *supra* note 100, at 10-11.

155. L. SPECTOR, *supra* note 3, at 93-95. Pakistan has one small reprocessing facility known as New Labs at Rawalpindi which is not under international safeguards. To date, Pakistan has not reprocessed spent fuel. If Pakistan were to engage in reprocessing, this would constitute a breach of its international obligations because all of Pakistan's spent fuel is under IAEA safeguards and may not be reprocessed at unsafeguarded facilities. *Id.* at 105, 109; Telephone interview with Leonard S. Spector, (Feb. 11, 1988) [hereinafter Spector Interview].

156. While awaiting execution in 1978, Bhutto described his overriding objective for Pakistan's nuclear program: "[w]hen I took charge of Pakistan's Atomic Energy Commission it was no more than a signboard of an office. It was only a name. Assiduously and with granite determination, I put my entire vitality behind the task of acquiring nuclear capability for my country. . ." L. SPECTOR, *supra* note 3, at 72 (quoting Z. BHUTTO, "IF I AM ASSASSINATED. . ." 137-38 (1979)). Bhutto is more known for a comment he allegedly made in 1965, "[i]f India builds the bomb, we will eat grass or leaves, even go hungry. But we will get one of our own. We have no alternative." S. WEISSMAND & H. KRONSNEY, THE ISLAMIC BOMB 161 (1981).

157. L. SPECTOR, *supra* note 3, at 71-72; Cronin, *supra* note 3, at 70.

158. L. SPECTOR, *supra* note 3, at 73. Following the Indian test, Bhutto proposed that the United Nations declare South Asia a nuclear-weapons-free zone. Ebinger, *supra* note 100, at 7.

the 1974 Indian test. It apparently came in 1971 after Pakistan's defeat at the hands of India in the second Indo-Pakistani War and was made by Bhutto to a group of scientists following his elevation to Prime Minister.[159]

In the early 1970s, Pakistan adopted a two-track approach to obtain the fissile material needed for nuclear weapons. Prior to the October 1973 OAPEC oil embargo, Pakistan commenced negotiations with France to purchase a large, commercial plutonium reprocessing facility. With only the small scale Kanupp reactor generating electricity, there was no economic justification for Pakistan to have a reprocessing facility with such a grossly excessive capacity. To counter criticism of the project, Islamabad drafted grandiose plans for a major expansion in its nuclear reactor program. Despite the criticism, Pakistan and France signed a contract for construction of the facility in 1974, to be located at Chashma ("the Chashma facility").[160]

Following India's test, Pakistan pursued a second route to a bomb capability through clandestine purchases and smuggling of technologies for the construction of a uranium enrichment facility. Pakistani agents founded dummy corporations in Western Europe, the United States and Japan. The agents circumvented the Nuclear Suppliers' "trigger list" by purchasing items either not on the list or, if on the list, their components and subcomponents.[161]

Dr. Abdul Qadir Khan was the mastermind of this international effort. As an engineer for a Dutch firm engaged in the construction of an enrichment plant in Europe, he stole technical data on the enrichment process and detailed lists of the key components used in the facility. Dr. Khan later returned to Pakistan and supervised the construction of an enrichment plant at Kahuta ("the Kahuta facility").[162]

3. The Exercise of United States Leverage

Prior to the passage of the original Symington Amendment, the Ford Administration reversed its position on the Chashma facility and sought to stop the sale.[163] The Carter Administration stepped up Ameri-

159. S. WEISSMAN & H. KRONNEY, *supra* note 156, at 42-46.

160. *See* L. SPECTOR, *supra* note 3, at 74; Ebinger, *supra* note 100, at 3-4.

161. L. SPECTOR, *supra* note 3, at 75-76, 81-82, 333-34; Marwah, *supra* note 144, at 169-70.

162. L. SPECTOR, *supra* note 3, at 75-76. *See* Nayar, *We have the A-Bomb, Says Pakistan's 'Dr. Strangelove'*, The Observor (London), Mar. 1, 1987, at 13, col. 1. ("[I]n an extraordinary frank aside, Khan made clear that Pakistan would be prepared to beg, borrow or steal whatever was required for its nuclear programme.").

163. *See* Ebinger, *supra* note 100, at 13. The Ford Administration appeared to have reached a compromise with France in early 1976. In exchange for Pakistan's agreement to

can opposition. Nevertheless, France and Pakistan continued with the project. In response, the Carter Administration terminated United States foreign aid to Pakistan in September 1977, though without formally invoking section 670(a) of the Foreign Assistance Act.[164] A change in French policymakers on nuclear affairs and clear evidence that President Zia, who overthrew Prime Minister Bhutto in July 1977, intended to produce nuclear weapons, led France to cancel the contract with Pakistan in August 1978. The Administration restored aid two months later.[165]

While world attention was focused on the Chashma facility, Pakistan had quietly succeeded in importing uranium enrichment equipment and technology to construct the Kahuta facility.[166] When its existence became known, the United States sent a high level State Department team to Islamabad to convince President Zia to dismantle the project. The effort failed. On April 6, 1979, President Carter invoked section 669 of the Foreign Assistance Act and terminated all United States aid to Pakistan.[167]

The aid cutoff backfired on the United States. Pakistani scientists continued to work on the Kahuta facility and to covertly acquire items for it.[168] The amount of aid cancelled, approximately 60 million dollars, was not enough to dissuade Pakistan from developing a weapons capability and was more than offset by monies from Western European and OPEC nations.[169] The cutoff triggered an "emotional response [in Pakistan] emphasizing that [its] sovereignty would not be sold."[170] United States intelligence services reported that Pakistan was preparing a nu-

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accept IAEA safeguards on the Chashma facility, the United States would support the deal. L. SPECTOR, *supra* note 3, at 78-79.

164. TASK FORCE, *supra* note 6, at 130; L. SPECTOR, *supra* note 3, at 80, 361 n.27.

165. L. SPECTOR, *supra* note 3, at 80-81; Lellouche, *supra* note 47, at 48-49.

166. *See supra* notes 161-62 and accompanying text.

167. L. SPECTOR, *supra* note 3, at 83. *See* Burt, *U.S. Aid to Pakistan Cut After Evidence of Atoms Arms Plan*, N.Y. Times, Apr. 7, 1979, at A1, col. 1 ("[A]dministration officials regard Pakistan's effort to produce the enriched nuclear material as nearly conclusive evidence that the country is seeking a nuclear-weapons capability.").

Immediately after the cutoff, one commentator stated that the Carter Administration had reluctantly decided to invoke the Symington Amendment and suggested that the Administration would, as incentives for Pakistan not to develop nuclear weapons, waive the Amendment and "offer Zia stronger guarantees of security, increased arms sales and greater economic aid." Barber, *The Islamic Atomic Bombshell*, FAR E. ECON. REV., Apr. 27, 1979, at 12, 13.

168. Van Hollen, *supra* note 47, at 160.

169. *See* TASK FORCE, *supra* note 6, at 133 n. 4.

170. Betts, Courtney, Rowen, Brody & Yager, *U.S. Policy Choices*, in NONPROLIFERATION AND U.S. POLICY, *supra* note 100, at 308, 354.

clear test site.[171]

4. The Soviet Invasion of Afghanistan

The Soviet Union invaded Afghanistan on December 25, 1979. From that date, the events in Afghanistan have played a crucial role in defining United States relations with Pakistan and India.[172]

Almost overnight, President Carter reversed his Administration's foreign policy on Pakistan.[173] President Carter reaffirmed a 1959 bilateral security agreement with Pakistan and offered Pakistan 400 million dollars in military and economic assistance over two years. President Zia rejected the aid offer as "peanuts."[174] Subsequently, the Administration rethought its policy on Pakistan. National Security Advisor Zbigniew Brzezinski and Deputy Secretary of State Warren Christopher flew to Islamabad on February 1, 1980 to negotiate an expanded aid package, conditioned on Pakistani assurances not to test an atomic bomb. Meanwhile, the administration had decided to ask Congress for an exemption of the Glenn-Symington Amendments to allow a resumption of aid for Pakistan.[175]

Leonard Spector, a senior associate with the Carnegie Endowment for International Peace, argues that the Brzezinski-Christopher mission marked a turning point in United States nonproliferation policy for Pakistan:

> Whereas prior to the Soviet invasion of Afghanistan, the Carter Administration had been prepared to impose economic and military aid

171. L. SPECTOR, *supra* note 3, at 83.

172. Rose, *United States and Soviet Policy Toward South Asia*, CURRENT HIST., Mar. 1986, at 97, 97.

173. *See* Weisman, *U.S. Interests in South Asia Is Deepening, Cautiously*, N.Y. Times, Jan. 17, 1988, at E2, col. 1. President Carter spoke with President Zia "very shortly" after the invasion and committed United States military aid to Pakistan. 16 WEEKLY COMP. PRES. DOC. 35, 35 (Jan. 7, 1980).

174. L. SPECTOR, *supra* note 3, at 85. *See* Agreement of Cooperation Between the Government of the United States of America and the Government of Pakistan, Mar. 5, 1959, 10 U.S.T. 317, T.I.A.S. 4190; *supra* note 47 and accompanying text.

175. L. SPECTOR, *supra* note 3, at 85. The Carter Administration intended "to enter into a long-term military support relationship with Pakistan that extend[ed] beyond the crisis cause[d] by the Soviet armed intervention in neighboring Afghanistan." Gwertzman, *White House Seeks Long-Term Aid To Bolster the Defense of Pakistan*, N.Y. Times, Feb. 1, 1980, at A1, col. 1.

Interestingly, the Brzezinski-Christopher mission departed for Islamabad the day after presidential candidate Ronald Reagan stated that it was more important to help Pakistan counter the Soviet move into Afghanistan, than to block Pakistan from developing nuclear weapons. *Reagan Charges Carter Policies Raise War Risk*, Wash. Post, Feb. 1, 1980, at A3, col. 6.

sanctions against Pakistan and to consider more severe measures to stop the Pakistani nuclear weapons effort in its tracks, the United States was now ready to maintain the flow of arms and aid even if Pakistan continued to advance its program, provided it did not *test* a nuclear device.[176]

### 5. The Reagan Administration Aid Package of 1981

In mid-1981, the Reagan Administration reached agreement with Islamabad on a 3.2 billion dollar, six-year aid package. The plan, evenly divided between economic and security assistance, included the sale of forty sophisticated F-16 jet fighters.[177] The Administration intended the aid "to create a stronger, more self-reliant Pakistan as it confront[ed] Soviet power in neighboring Afghanistan."[178]

While acknowledging the nonproliferation goals expressed in the Glenn-Symington Amendments, the Reagan Administration criticized the April 1979 cutoff as a failure and asked Congress for a specific waiver of the amendments for Pakistan. Under-Secretary of State James Buckley claimed that the support program would curb Pakistan's desire for nuclear weapons by enhancing its sense of security and would provide an opportunity for the United States to influence Pakistan's nuclear decisions.[179] He informed Congress that "President Zia has provided assurances that Pakistan would not develop nuclear weapons."[180] Despite

176. L. SPECTOR, *supra* note 3, at 85-86.

177. *Id.* at 90; *A Seesawing Policy on Pakistan Aid*, 1987 CONG. Q. WEEKLY REP. 2669, 2669.

178. *Aid and the Proposed Arms Sales of F-16's to Pakistan: Hearings before the Senate Comm. on Foreign Relations*, 97th Cong., lst Sess. 6 (1981) [hereinafter *Proposed Arms Sales*] (statement of James Buckley, Under Secretary of State for security assistance).

179. *Id.* at 9 (statement of James Buckley).

180. *Security and Economic Assistance to Pakistan: Hearings before the House Comm. on Foreign Affairs*, 97th Cong., lst Sess. 88 (1981) (testimony of James Buckley). The full statement provided to Congress read as follows:

> President Zia has provided assurances that Pakistan would not develop nuclear weapons, and that Pakistan would not transfer sensitive nuclear technology or equipment to other states. I accept those assurances at face value.
>
> As you know, the United States sees no differences between a nuclear weapons test and a peaceful nuclear explosion and we have made our position abundantly clear to Pakistan. We believe that Pakistan nevertheless does make such a distinction and that it may develop the capability to explode a device.
>
> We have also made it abundantly clear to Pakistan that should it explode a device, the effect on our relations would be most severe. We are confident that Pakistan has understood what we have said.
>
> With these considerations in mind, we consider that we are not presently in a position to exercise the existing waiver provision of the Symington amendment.
>
> We continue to believe, however, that our national security interests would be

President Zia's assurances, Buckley did not question that Pakistan continued to actively seek a nuclear weapons capability.[181]

Congress accepted the Administration's arguments and enacted the aid package in the International Security and Development Cooperation Act of 1981, signed into law by President Reagan on December 29, 1981. Section 736 of the Act amended the Foreign Assistance Act of 1961 with a specific provision for aid to Pakistan.[182]

The stated purpose of the program was "to benefit the people of Pakistan by helping them meet the burdens imposed by the presence of Soviet forces in Afghanistan and by promoting economic development."[183] Congress granted the President authority to waive section 669 of the Foreign Assistance Act for Pakistan, relating to the transfer of nuclear enrichment technology, from December 29, 1981 to September 30, 1987.[184] To counterbalance the waiver of Section 699, and with Pakistan in mind, Congress added subsection (b) to Section 670 of the Foreign Assistance Act, which strengthened the termination language of the original Glenn-Symington Amendments relating to nuclear explosions by NNWS.[185]

On February 10, 1982, President Reagan exercised the authority granted to him by the International Security Act to waive the prohibitions of section 669 until September 30, 1987. President Reagan also waived provisions of section 670(a) with respect to a cutoff of funds for receipt of plutonium reprocessing technology by utilizing the "built-in" waiver of the section.[186] President Reagan certified to Congress that not

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served by providing the President waiver authority on these grounds. We also believe that the new security relationship with Pakistan, for which a legislative change in the Symington amendment is an essential element, provides us with the best hope for effectively influencing Pakistani decision-making on this issue in the future.

*Id.* Buckley's statement explains why the Reagan Administration needed a specific exemption for the Symington Amendment. The administration could not take advantage of the "built-in" waiver provision of section 669 because the President could not certify he had "received reliable assurances" that Pakistan was not developing nuclear weapons. *See* 22 U.S.C. § 2429(b)(1) (1982).

181. *Proposed Arms Sales*, *supra* note 178, at 21 (testimony of James Buckley).

182. International Security and Development Cooperation Act of 1981, Pub. L. No. 97-113, § 736, 95 Stat. 1519, 1561-62 (1981) (current version at 22 U.S.C.A. § 2375 (West Supp. 1988)).

183. 22 U.S.C. § 2375(a) (1982).

184. *Id.* § 2375(d) (current version at 22 U.S.C.A. § 2375(d) (West Supp. 1988)).

185. *Id.* § 2429a(b). *See A Seesawing Policy on Pakistan Aid*, *supra* note 177, at 2669.

186. Presidential Determination No. 82-7, 3 C.F.R. 241 (1983), *reprinted in* 22 U.S.C.A. § 2375 app. at 206 (West Supp. 1988). The waiver of section 670(a) was necessary because following the cancellation of the Chashma facility in 1978 Pakistan made clandestine purchases of reprocessing technology. TASK FORCE, *supra* note 6, at 130.

furnishing assistance to Pakistan "would be seriously prejudicial to the achievement of United States nonproliferation objectives and otherwise jeopardize the common defense and security."[187] Provisions on termination of assistance for the testing of a nuclear device contained in section 670(b) were not waived and still apply to Pakistan.

The International Security Act codified United States policy on Pakistan for the beginning of the 1980s. The policy assumed that the primary interest of the United States in Pakistan was to aid the Afghan rebels and for this it was essential that the United States to maintain good relations with Pakistan.[188] Though principally designed to serve United States strategic interests in the region, the Reagan Administration also argued that United States assistance would also diminish Pakistan's motivations to build a bomb. However, Pakistan's nuclear intentions had been clear to Washington for years and by virtue of President Reagan's action on February 12, 1982, Pakistan could continue in its efforts to obtain a weapons capability without risking an American aid cutoff, provided it did not test a nuclear device. The United States was left only with export controls and diplomatic pressure on Pakistan as the primary tools to curb Pakistan's nuclear program.[189]

### 6. Reagan Administration Successes and Failures

The Reagan Administration followed a policy of export controls and diplomatic pressure with mixed results. The Administration was unable to orchestrate an international embargo on the sale of nuclear technology and material to Pakistan. Pakistan repeatedly circumvented United States and European export controls to purchase critically important items for its nuclear facilities.[190]

The Administration did have its successes. After the IAEA reported in 1981 that it could not guarantee diversions of spent fuel were not occurring at Kanupp, and presented intelligence reports that Pakistan had constructed an indigenous reprocessing facility, the Reagan Administration reportedly warned Islamabad in 1982 that, if Pakistan were to reprocess any spent fuel, United States aid would be cut off.[191] To date, Pakistan has not engaged in plutonium reprocessing.[192]

187. Presidential Determination No. 82-7, 3 C.F.R. 241 (1983), *reprinted in* 22 U.S.C.A. § 2375 app. at 206 (West Supp. 1988).

188. Ebinger Interview, *supra* note 131.

189. *See* L. SPECTOR, *supra* note 3, at 86.

190. *See id.* at 89-90.

191. *Id.* at 96, 105-06.

192. *See supra* note 155.

Equally significant, the Administration successfully blocked Islamabad's plans for commercial nuclear power development. It is essential for Pakistan's economic growth that its electrical generating capacity be expanded to reduce the nation's dependence on imported oil and meet a projected energy shortfall.[193] The energy program of former President Zia called for the construction of as many as five 1000-megawatt nuclear power reactors over the next fifteen years.[194] In 1982, Pakistan solicited international bids on a 900-megawatt reactor at Chashma. No bids were received. Nor as of 1987 had any nation submitted a bid on the project because of an agreement "among the major nuclear supplier countries not to compete in markets that are controversial with respect to nonproliferation assurances."[195]

7. 1984 Events and Reagan Policy Shift

A series of disturbing events occurred in 1984 demonstrating that the United States had not persuaded Pakistan to forego a nuclear weapons program. Press accounts surfaced in 1983 and 1984 that China had given Pakistan blueprints of tested nuclear weapons.[196] In February 1984, Dr. Abdul Khan announced that Pakistan had achieved the capability to enrich uranium.[197] Finally, in July 1984, three Pakistani nationals were indicted in Houston for attempting to smuggle out of the United States electronic switches used in the firing mechanism of a nuclear bomb.[198]

The Senate Foreign Relations Committee reacted quickly to these events. It unanimously approved on March 28, 1984 an amendment authored by Senators Cranston and Glenn that would have halted aid to

193. M. Khan, *Atomic Energy for Economic Development*, ECON. REV. (Karachi), Sept. 1986, at 145-46. "Pakistan's import bill for oil increased from $63 million in FY-1973 to $1,419 million, (25 percent of total imports) in FY 1984. Shortages of electric power resulted in increasingly prolonged blackouts and brownouts in major cities and rural areas." M. Williams & L. Rudel, U.S. Economic Assistance to Pakistan: Review of the Period 1982-1987 (Final Report) 89 (June 22, 1988) (available from the United States Agency for International Development). *See generally* W. WALKER & M. LÖNNROTH, *supra* note 23, at 87.

194. Khan, *supra* note 193, at 146.

195. *Disagreement Remains With France Over Cutoff*, NUCLEAR NEWS, July 1987, at 58, 58. *See* L. SPECTOR, *supra* note 3, at 96-97; Cronin, *supra* note 3, at 65. In 1988, it was reported that France and Pakistan were negotiating the sale of a large nuclear power plant. STAFF REPORT, *supra* note 29, at 42.

196. L. SPECTOR, *supra* note 3, at 101.

197. *Id.* at 98-99 ("[D]r. Abdul Qadir Khan . . . announced during an interview that 'by the grace of God, Pakistan is now among the few countries in the world that can efficiently enrich uranium' and had 'destroyed the monopoly forever' that the advanced nations enjoyed in this field.").

198. *Id.* at 100-01.

Pakistan if the President did not certify that Pakistan neither possessed a nuclear device nor was acquiring the means for detonating one. Informed by the Administration that President Reagan could not make this certification, and fearing that a subsequent termination of aid to Pakistan "could convince the Pakistanis that the rapid acquisition of a nuclear device is the only way to provide for their national security," the committee reversed itself and voted eight to seven to draft a substitute amendment.[199]

The new amendment only required the President to certify that Pakistan did not possess a nuclear device and that United States aid will reduce the risk Pakistan will possess a nuclear device.[200] On the floor of the Senate, the amendment was defeated and Congress appropriated economic and security assistance for Pakistan at the level requested in the President's fiscal year 1984 budget.[201]

Pressured by the Foreign Relations Committee and confronted by Pakistan's completion of the Kahuta facility, President Reagan wrote President Zia in September 1984 seeking assurances that Pakistan would not enrich uranium above five percent, the point at which natural uranium is no longer enriched for commercial nuclear reactors. Otherwise, there would be grave consequences for United States-Pakistani relations. President Zia responded with a pledge not to enrich uranium above the five percent level.[202] The Reagan letter marked a major change from the previous policy of limited opposition to Pakistan's nuclear program as long as Pakistan did not detonate a nuclear device. The United States refused to continue to acquiesce to Pakistan's nuclear activities.[203] If President Zia had abided by his pledge, Pakistan would not today possess fissile material.

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199. S. REP. NO. 400, 98th Cong., 2d Sess. 59 (1984). *See* L. SPECTOR, *supra* note 3, at 102-03.

200. S. REP. NO. 400, *supra* note 199, at 58.

201. Cronin, *supra* note 3, at 87 n. 63. President Reagan requested and received $525 million in security assistance for Pakistan. Security assistance includes Foreign Military Sales loans and Economic Support Fund loans and grants, which are used to aid countries with heavy defense costs. *'Security Aid' Totals, Fiscal 1984-85*, 40 CONG. Q. ALMANAC 397, 397 (1984). Total United States assistance for Pakistan, including development aid, was $608.2 million for fiscal year 1984. AGENCY FOR INTERNATIONAL DEVELOPMENT, U.S. OVERSEAS LOANS AND GRANTS AND ASSISTANCE FROM INTERNATIONAL ORGANIZATIONS, JULY 1, 1945 - SEPTEMBER 30, 1987, at 25 (1988) [hereinafter U.S. OVERSEAS LOANS].

202. *See, e.g.*, W. DONNELLY, *supra* note 146, at CRS-3; TASK FORCE, *supra* note 6, at 131; *A Seesawing Policy on Pakistan Aid*, *supra* note 177, at 2669.

203. Spector Interview, *supra* note 155.

### 8. 1985 Congressional Action and Reagan Policy Reversal

For the first time since 1981, Congress passed a foreign aid authorization bill in 1985. In previous years Congress had been unable to pass a separate authorization bill and had lumped foreign aid along with the other authorization bills into a single spending bill approved under a continuing resolution at the end of each year's session. 1985 also marked the first year that Congress pared down the Reagan Administration's foreign aid buildup.[204] Economic and security assistance for Pakistan, however, escaped the budget cuts. In fact, United States assistance increased from the previous fiscal year to a total of 550.2 million dollars.[205]

Critics of aid for Pakistan did have two legislative victories. First, the substitute amendment of the Senate Foreign Relations Committee, defeated in 1984, was revived and included in the International Security and Development Cooperation Act of 1985. The amendment states that no United States assistance shall be furnished nor military equipment or technology shall be sold or transferred to Pakistan unless the President certifies to Congress during the fiscal year in which assistance is to be furnished that "Pakistan does not possess a nuclear device and that the proposed United States assistance programs will reduce significantly the risk that Pakistan will possess a nuclear explosive device."[206]

The amendment does not rescind President Reagan's 1982 waivers of sections 669 and 670(a) of the Foreign Assistance Act pertaining to nuclear enrichment and plutonium reprocessing technology transfers. Rather, the amendment establishes in the Foreign Assistance Act an event, possession of a nuclear device, lower on the "staircase" of proliferation than contained in section 670(b), which mandates a termination of aid in case of a nuclear explosion.[207] The amendment reflected Congressional concern that Pakistan could receive hundreds of millions of dollars in United States aid while covertly accumulating a nuclear weapons arsenal, without penalty under United States law.[208]

The amendment also functions differently than sections 669 and 670(a) and (b) because there is no event triggering a cutoff in United States aid. Instead, the President must issue the certification for each

204. *Congress Clears Foreign Aid Authorization Bill*, 41 CONG. Q. ALMANAC 41, 41 (1985).

205. *'Security Aid' Totals, Fiscal 1986-88*, 1987 CONG. Q. WEEKLY REP. 115, 115. Total United States aid for fiscal year 1985 was $665.2 million. *See* U.S. OVERSEAS LOANS, *supra* note 201, at 25.

206. The International Security and Development Cooperation Act of 1985, § 902, 22 U.S.C. § 2375(e) (Supp. IV 1986).

207. *See* 22 U.S.C. §§ 2429-2429a (1982 & Supp. IV 1986).

208. TASK FORCE, *supra* note 6, at 131-32.

fiscal year before aid is furnished or military equipment sold and the President does not have the authority to waive certification. While applicable only to Pakistan, the scope of the amendment is broader than the cutoff provisions since it prohibits both United States aid and military sales, whereas sections 669 and 670(a) and (b) only restrict United States aid.[209] President Reagan transmitted the certification to Congress for fiscal years 1986 through 1989.[210]

The second accomplishment by critics of aid to Pakistan was the addition of the Solarz Amendment to section 670(a) of the Foreign Assistance Act. Section 670(a) now contains prohibitions on transfers of nuclear reprocessing technology and mandates an aid cutoff if a NNWS, its agent, or person otherwise acting on behalf of the nation, on or after August 8, 1985:

> exports illegally (or attempts to export illegally) from the United States any material, equipment, or technology which would contribute significantly to the ability of such country to manufacture a nuclear explosive device, if the President determines that the material, equipment, or technology was to be used by such country in the manufacture of a nuclear explosive device.[211]

The amendment was drafted in reaction to the conviction of a Pakistani national the preceding year for attempting to smuggle nuclear weapons parts out of the United States[212]

On its face, the Solarz Amendment is less restrictive than the other cutoff provisions of sections 669 and 670(a) and (b) because it is not self-executing. The President must first determine that the nation in question was involved in the illegal effort. Under the other cutoff provisions, the President's authority to furnish assistance expires upon the triggering event.[213] As in the case of plutonium reprocessing transfers, the President may indefinitely waive the Solarz Amendment through certification to Congress that "termination of such assistance would be seriously prejudicial to the achievement of United States nonproliferation objectives or

209. 22 U.S.C. §§ 2429-2429a (1982 & Supp. IV 1986).

210. Presidential Determination No. 86-03, 3 C.F.R. 427 (1986), *reprinted in* 22 U.S.C. § 2375(e) app. at 761 (Supp. IV 1986); Presidential Determination No. 87-3, 3 C.F.R. 275 (1987), *reprinted in* 22 U.S.C. § 2375(e) app. at 761 (Supp. IV 1986); Presidential Determination No. 88-4, 3 C.F.R. 316 (1988); Presidential Determination No. 89-7, 53 Fed. Reg. 49111 (1988).

211. The International Security and Development Cooperation Act of 1985, § 1204, 22 U.S.C. § 2429a(a)(1) (Supp. IV 1986).

212. *See* H.R. REP. No. 39, 99th Cong., lst Sess. 99 (1985); Pear, *Legislators Move on Atom Exports*, N.Y. Times, Mar. 27, 1987, at A9, col. 1.

213. 22 U.S.C. §§ 2429-2429a (1982 & Supp. IV 1986).

otherwise jeopardize the common defense and security."[214]

Beginning in 1985, the government of President Zia provided the Reagan Administration "unequivocal assurances" that it would not engage in any illegal smuggling activities in the United States.[215] The reliability of these assurances, along with President Zia's earlier assurances that Pakistan would not develop nuclear weapons, became highly suspect in late 1985 and early 1986 when Washington received intelligence reports that Pakistan had enriched uranium to a weapons grade level. President Zia had breached his 1984 promise to President Reagan not to enrich uranium above the five percent level.[216]

At this point, the Reagan Administration was negotiating with Islamabad on the broad outlines of a new aid program.[217] The Administration had to decide whether to maintain opposition to Pakistan's nuclear enrichment activities, or to reverse itself and agree to more assistance. It chose the latter position. United States nonproliferation policy for Pakistan reverted back to the earlier policy of acquiescence, although now modified by the certification requirement that Pakistan did not possess a nuclear device.[218]

### 9. 1987 Capitol Hill Battle Over President Reagan's Second Aid Package to Pakistan

A series of events in 1987 placed greater attention on Pakistan's nuclear program. In February 1987 the American Ambassador to Pakistan said it was "open to question" whether President Reagan could certify for fiscal year 1988 that Pakistan did not possess a nuclear device.[219] In

214. 22 U.S.C. § 2429a(a)(2) (1982).

215. Murphy, *supra* note 6, at 53.

216. Spector Interview, *supra* note 155. *See* Woodward, *Pakistan Reported Near Atom Arms Production*, Wash. Post, Nov. 4, 1986, at A1, col. 3.

217. Murphy, *FY 1988 Assistance Requests for the Middle East and South Asia*, DEP'T ST. BULL., May 1987, at 59, 63.

218. Spector Interview, *supra* note 155. *See* TASK FORCE, *supra* note 6, at 131.

219. *Nuclear Non-Proliferation*, *supra* note 5, at 192 (text of Ambassador Deane Hinton's speech of Feb. 16, 1987). The complete statement of Ambassador Hinton was as follows:

> In 1985, Congress legislated a new annual requirement that, for our assistance program to continue, the President must certify that Pakistan does not have a nuclear explosive device and that our aid substantially reduces the risk it will obtain one. The President has twice so certified. For the future, I would note that it is open to question whether the President could so certify were he to conclude that Pakistan had in hand, but not assembled, all the needed components for a nuclear explosive device.

*Id.* at 191-92. Richard Kennedy, the Reagan Administration's top official on nonproliferation policy, sought to qualify Ambassador Hinton's remarks in testimony before Congress on February 25, 1987: "Ambassador Hinton's speech simply expressed . . . our longstanding concern

March Dr. Abdul Khan boasted that Pakistan had constructed nuclear bombs.[220] Later in the month, President Zia stated in a *Time* magazine interview that Pakistan had achieved a nuclear weapons capability, but denied that Pakistan possessed or intended to construct nuclear weapons.[221] On July 28, 1987, a Pakistani businessman, Arshad Pervez, and a retired Pakistani brigadier general were indicted in Philadelphia for conspiring to illegally obtain an export license needed to ship twenty-five tons of maraging 350, a special steel alloy that could be used to enrich uranium.[222] The same week the indictments in Philadelphia were handed down, in an unrelated case, United States attorneys indicted two Americans and a Hong-Kong Chinese in Sacramento for illegally exporting to Pakistan fifteen shipments of nuclear weapons testing equipment between 1982 and 1983.[223]

President Reagan's budget for fiscal year 1988 included 290 million dollars in military aid and 250 million dollars in economic aid for Paki-

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about the direction and certain aspects of the Pakistani nuclear program. The statements . . . were meant to impress on the audience the deep seriousness of these concerns." *Id.* at 42 (testimony of Richard Kennedy).

220. Nayar, *supra* note 162, at 13, col. 1. Through a statement released by the Pakistan Embassy in Washington, D.C., Dr. Khan claimed the remarks attributed to him in the report were false. Indian, American, and even Pakistani commentators did not doubt the accuracy of the article. Chanda, *Yes, We Have No Bomb*, FAR E. ECON. REV., Mar. 12, 1987, at 34, 34. *See* Nordland, *A Pakistan Bombshell*, NEWSWEEK, Mar. 16, 1987, at 45.

221. Munro, *supra* note 6, at 42. Following the interview, President Zia "vehemently denied that Pakistan is capable of producing a nuclear weapon" and said his statements were used out of context. King, *No Nuclear Bomb, Zia Insists*, DEF. WEEK, Apr. 6, 1987, at 10, 10. President Zia attributed the speculation concerning his nation's nuclear activities to "a conspiracy directed by the 'Zionist lobby in the U.S.' and the Indian government." *Id.*

222. Oberdorfer, *2 Indicted in Pakistani Nuclear-Export Case*, Wash. Post, July 29, 1987, at A10, col. 4.

The indictments resulted from the arrest of Arshad Z. Pervez, a Canadian of Pakistani origin, on July 10, 1987 for attempting to bribe a customs official to issue an export license needed to ship the steel. Pervez was charged with eight counts of conspiracy, bribery, false statements, and attempted exportation of beryllium, an element used in the detonation of nuclear weapons. According to the indictment, Pervez was working for retired brigadier general Inam ul-Haq. From Pakistan, Inam coordinated the importation of materials for Pakistan's nuclear program. *Id.* The Pakistani government denied any connection to the conspiracy and issued an arrest warrant for Inam. Serrill, *A Bad Case of Nuclear Friction*, TIME, Aug. 17, 1987, at 40, 40.

A federal jury convicted Pervez on December 17, 1987 of conspiracy, making false statements to the government, and attempted exportation of beryllium. He was acquitted of bribery, interstate travel in aid of racketeering and illegally seeking to obtain an export license for the steel alloy. Lounsberry, *Importer guilty of conspiracy*, Philadelphia Inquirer, Dec. 18, 1987, at 17-A, col. 6.

223. *Nuke Rebuke*, ASIAWEEK, Aug. 2, 1987, at 21, 21; *A Wink at Proliferation*, ECONOMIST, Aug. 15, 1987, at 23, 24.

stan.[224] This aid was to be the first installment of a new six year, 4.02 billion dollar aid package.[225] The Administration asked Congress for another six year waiver of section 699 of the Foreign Assistance Act of 1961. The original waiver was set to expire on September 30, 1987, at which point United States aid would have to be terminated.[226]

Richard Murphy, the Reagan Administration's top official on South Asian Affairs, voiced almost the same arguments used by Under-Secretary of State James Buckley six years earlier in urging Congress to approve the Administration's first aid request for Pakistan. Murphy told Congress that "Pakistan plays a critical and dangerous role in opposing Soviet aggression."[227] In regard to nonproliferation concerns, Murphy repeated the claim that United States assistance strengthened United States influence over Pakistan's nuclear activities and that a shift to "a policy of threats and public ultimata" would be ineffective and increase the incentives for Pakistan to possess nuclear weapons.[228]

Congress' approval of the new aid package seemed assured through the first half of 1987. Despite the statements by Dr. Khan and President Zia, in April leading liberal Democrats joined their Republican colleagues on the House Foreign Affairs Committee and the Senate Foreign Relations Committee, over the objections of the majority of the committees' Democratic members, to approve the package and reject any strict conditions on it. However, both committees reduced the period of the proposed waiver of section 699 from six to two years.[229]

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224. *Foreign Assistance Legislation for Fiscal Years 1988-89 (part 5): Hearings and Markup Before the Subcomm. on Asian and Pacific Affairs of the House Comm. on Foreign Affairs*, 100th Cong., 1st Sess. xiii, xlvii (1987) (Subcomm. Report) [hereinafter *Subcomm. Markup*]. The Administration also requested $80 million for P.L. 480 Title I and III programs and $50 million for developmental assistance. *Id. See* Felton, *Military Aid — Including Contra Money — Is Priority*, 1987 CONG. Q. WEEKLY REP. 61, 61.

225. Murphy, *supra* note 217, at 63.

226. *See, e.g.*, TASK FORCE, *supra* note 6, at 129-30; Armacost, *South Asia and the United States: An Evolving Partnership*, DEP'T ST. BULL., July 1987, at 75, 78; Ottaway, *Pakistan's Nuclear Intentions Called Into Doubt*, Wash. Post, Mar. 6, 1987, at A29, col. 1. The President could not take advantage of the "built-in" waiver of the Symington Amendment because, as admitted by Robert Peck, Deputy Secretary of State, in a letter to Senator John Glenn, "the United States can no longer obtain 'reliable assurances' from Pakistan that it is not producing material for nuclear weapons." *Id.*

227. Murphy, *supra* note 217, at 63.

228. *Id.* at 64.

229. *See* Madison, *supra* note 148, at 1173-74; Pressman, *House Panel Drafts a Pared-Down Aid Bill*, 1987 CONG. Q. WEEKLY REP. 667, 667; Pressman, *$11.1 Billion for Foreign Aid Is Approved by Senate Panel*, 1987 CONG. Q. WEEKLY REP. 786, 786.

The Subcommittee on Asian and Pacific Affairs of the House Committee on Foreign Affairs viewed an aid cutoff as the worst way to influence Pakistan's nuclear activities: "[e]very single witness who appeared before the Subcommittee, including experts from within and with-

Pakistan's support for the Afghan rebels resisting the Soviet occupation was the crucial factor in influencing the liberal Democrats to back the President's request.[230] After the votes of the two committees, opponents of aid to Pakistan saw little chance of defeating the request.[231]

The July indictments of the two Pakistani nationals in Philadelphia completely changed the situation. Claiborne Pell, the chairman of the Senate Foreign Relations Committee, asserted that the Solarz Amendment has been " 'egregiously violated' " and called for the end of aid to Pakistan.[232] Representative Stephen Solarz, one of the liberal Democrats who sided with the Republicans on the House Foreign Affairs Committee's vote in April, drafted an amendment requiring that the President certify to Congress that Pakistan was not enriching uranium above the five percent level before aid could be provided.[233]

Assistant Secretary of State Richard Murphy responded on behalf of the Administration to the indictments in testimony before two House subcommittees on July 22, 1987. The Administration would uphold United States law, but Murphy reminded the members of Congress of "our global security interests and the importance to these interests of maintaining our support for Pakistan in its vital posture of opposition to the Soviet occupation of Afghanistan."[234] A few days later, the State Department dispatched Under-Secretary of State Michael Armacost to Islamabad to ask President Zia to open Pakistan's nuclear facilities to international inspection. President Zia refused the request, though he offered Pakistan's cooperation in the investigation of the two Pakistani nationals.[235]

Congressional opposition to the aid package reached its highest point when the Senate on July 31 and the House on August 3, 1987 passed nonbinding resolutions urging Pakistan to agree to verifiable measures to show that it was not producing weapons-grade nuclear

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out the Administration, testified that even if faced with the stark choice between U.S. assistance and its nuclear program, Pakistan would forgo U.S. assistance." *Subcomm. Markup*, *supra* note 224, at L.

230. Madison, *supra* note 148, at 1174 ("Not only is Pakistan supporting the Afghan rebels, known as Mujahedeen, but it is also the conduit through which covert U.S. assistance flows to the rebels. And it is the war in Afghanistan that supersedes the nonproliferation question in the minds of most Members when Congress considers aid to Pakistan.").

231. Sciolino, *Pakistan Aid Foes Vow Fight*, N.Y. Times, Apr. 25, 1987, at A5, col. 1.

232. Towell, *Nuclear-Materials Incident Jeopardizes Aid to Pakistan*, 1987 CONG. Q. WEEKLY REP. 1668, 1668.

233. Revzin, *Nuclear Project Bedevils Aid for Pakistan*, Wall St. J., Dec. 8, 1987, at 24, col. 1.

234. Murphy, *supra* note 6, at 53.

235. Gordon, *Pakistan Rejects Atomic Inspection*, N.Y. Times, Aug. 5, 1987, at A5, col. 1.

materials if it desired additional United States assistance.[236]

Congress failed to pass a foreign aid appropriations bill before the start of the fiscal year on October 1, 1987. Consequently, the President's authority to waive the provisions of section 669 of the Foreign Assistance Act expired on September 30, 1987. Foreign aid could no longer be legally provided to Pakistan.[237]

The aid cutoff was to last only a few months. With the exception of 1985, Congress had not passed a separate authorization bill for foreign aid since 1981. The legislative process again broke down in 1987. The House approved the authorization bill of the Foreign Affairs Committee on December 10, 1987, but the bill never became law because the Senate refused to pass the authorization bill proposed by its Foreign Relations Committee. Control over the President's foreign aid request shifted to the House and Senate Appropriations Committees.[238]

In August 1987 the House Appropriations Committee reported a bill that provided the same levels of aid for Pakistan as requested, while slashing the President's total foreign assistance budget by over sixteen percent. The bill granted to the President the authority to waive section 699 from January 15, 1988 until September 30, 1988, while also requiring the President to report to Congress on Pakistan's nuclear enrichment activities.[239]

The aid package moved through Congress toward approval. On December 2, 1987, the House Rules Committee blocked Representative Solarz from offering his amendment to the full House for a vote.[240] The next day, the Senate Appropriations Committee approved its version of

236. H.R. Res. 239, 100th Cong., 1st Sess., 133 CONG. REC. H6982-83 (daily ed. Aug. 3, 1987); S. Res. 266, 100th Cong., 1st Sess., 133 CONG. REC. S11041 (daily ed. July 31, 1987).

237. *See Pakistan Aid Battle Due*, 1987 CONG. Q. WEEKLY REP. 2392, 2392. Ambassador Richard Kennedy admitted in testimony to Congress on October 22, 1987 that the Reagan Administration did not have sufficiently reliable assurances to invoke the Symington Amendment. Critically, he also stated that Pakistan had enriched uranium above the five percent level at the Kahuta facility, meaning that Pakistan possessed weapons grade uranium. *Pakistan and United States Nuclear Nonproliferation Policy: Hearing Before the Subcomms. on Arms Control, International Security, and Science, and Asian and Pacific Affairs, and International Economic Policy and Trade of the House Comm. on Foreign Affairs*, 100th Cong., 1st Sess. 33-34 (1987) (testimony of Richard T. Kennedy, Ambassador at large and special advisor to the Secretary of State on Nonproliferation Policy and Nuclear Energy Affairs).

238. *See generally* Pressman, *House Passes Foreign Aid Authorization Bill*, 1987 CONG. Q. WEEKLY REP. 3056, 3056.

239. *See* H.R. REP. NO. 283, 100th Cong., 1st Sess. 8, 96, 106-107 (1987). *See also* Towell, *House Panel Makes Deep Cuts In Foreign-Assistance Funding*, 1987 CONG. Q. WEEKLY REP. 1900, 1900, 1902.

240. Felton, *Budget Deal Softens the Blow to Foreign Aid*, 1987 CONG. Q. WEEKLY REP. 2979, 2980.

the fiscal 1988 foreign aid spending bill. The committee's bill contained 150 million dollars in economic and 200 million dollars in military aid for Pakistan, a total reduction of 190 million dollars from the President's budget request.[241]

The Senate Appropriations Committee's bill also granted the President a six year exemption from section 699 conditioned on a complex set of provisions directly linking aid for Pakistan with the nuclear programs of both Pakistan and India. Neither American aid nor exports of sophisticated equipment and technology with military applications to any country in South Asia were to be allowed if the President determined that the country was producing fissile material in unsafeguarded facilities, until that country ceased producing such material. The President could waive the cutoff of aid or export sales, however, if he certified to Congress that a second nation was manufacturing fissile material in unsafeguarded facilities, that the failure of the second nation to agree to cease production of fissile material was a factor in the continued production of fissile material in the first nation, and if the waiver was in the national interest.[242]

The committee rejected past United States policy that concentrated solely on Pakistan's nuclear efforts and called for a regional approach because "the root cause of the nuclear problem in South Asia is competition between India and Pakistan."[243] Analysts interpreted the committee's linkage of the nuclear activities in Pakistan and India as a reflection of the support to aid for Pakistan in Congress and an endorsement of Pakistan's claim that it was justified in pursuing a nuclear weapons option because of India's 1974 nuclear test.[244]

On December 12, 1987, the *Financial Times* of London reported that Pakistan was building a second nuclear enrichment plant.[245] Two days later, both houses of Congress had passed their respective appropriations bills and convened a conference committee. On December 17, 1987, the conference committee set aid for Pakistan was set at 480 mil-

241. S. 1924, 100th Cong., 1st Sess. 24, 36 (1987).

242. S. REP. No. 236, 100th Cong., 1st Sess. 246-48 (1987). *See* Felton, *supra* note 240, at 2980. In linking the nuclear programs of Pakistan and India together for purposes of United States aid to Pakistan, the Senate Appropriations Committee was following the lead of the House Foreign Affairs Committee. The bill reported to Congress by the House Foreign Affairs Committee rescinded the waiver of the Symington Amendment for Pakistan if India accepted full-scope safeguards. *Foreign Assistance Legislation For Fiscal Years 1988-1989 (Part 8): Markup Before the House Committee on Foreign Affairs*, 100th Cong., 1st Sess. 907 (1987).

243. S. REP. No. 236, *supra* note 242, at 34.

244. Weisman, *supra* note 173, at E2.

245. Lewis, *Report of Pakistani Plant for Nuclear-Arms Component Is Weighed*, N.Y. Times, Jan. 10, 1988, at A1, col. 1.

lion dollars. The conference committee eliminated the conditions attached to the funds in the Senate bill and, instead, the conferees provided the President a two-and-a-half-year waiver of section 669.[246]

The conference committee's action came just a few hours before Arshad Pervez was convicted by a federal jury in Philadelphia of attempting to smuggle out of the United States nuclear weapons related material for Pakistan.[247] Also on December 17, 1987, President Reagan certified for fiscal year 1988 that "Pakistan does not possess a nuclear explosive device and that the proposed United States assistance program will reduce significantly the risk that Pakistan will possess a nuclear explosive device."[248] Neither the *Financial Times* report nor the Pervez conviction had any impact on the debate by the conference committee on the waiver of section 669.[249] With the prospect for a successful outcome to the Geneva negotiations on a withdrawal of Soviet forces from Afghanistan, there was little chance of Congress encumbering United States assistance to Pakistan, which might have been perceived by the Soviet Union as weakening Pakistan's negotiating position.[250]

On December 22, 1987, Congress finally enacted the government's budget for fiscal year 1988. Aid for Pakistan and waiver of section 669 was in the form agreed upon by the conference committee. Of the 480 million dollars in aid for Pakistan, 260 million dollars was in security assistance and 220 million dollars in economic assistance.[251]

### 10. President Reagan's Waivers of the Solarz and Symington Amendments

During the second week of January 1988 the State Department sent

246. Calmes, *Big Spending Decisions Go Down to the Wire*, 1987 CONG. Q. WEEKLY REP. 3117, 3119; Felton, *Military Programs Take Hits as Hill Cuts Back Foreign Aid*, 1987 CONG. Q. WEEKLY REP. 3122, 3122. The conference report was printed in the Congressional Record. For the specific provisions on aid to Pakistan, see H.J. Res. 395, 100th Cong., 1st Sess., 133 CONG. REC. at H12431, H12434, H12436, H12443 (daily ed. Dec. 21, 1987, pt. III).

247. Oberdorfer, *Conferees Won't Penalize Pakistan*, Wash. Post, Dec. 18, 1987, at A10, col. 1.; Spector Interview, *supra* note 155.

248. Presidential Determination 88-4, 3 C.F.R. 316 (1988). In his communication to Congress accompanying the certification, President Reagan emphasized that he had "taken into account the fact that the statutory standard as legislated by Congress is whether Pakistan possesses a nuclear explosive device, not whether Pakistan is attempting to develop or has developed the various relevant capacities." Letter from President Reagan to Jim Wright, Speaker of the House of Representatives (Dec. 17, 1981).

249. Spector Interview, *supra* note 155.

250. STAFF REPORT, *supra* note 29, at 13. *See* Pressman, *supra* note 238, at 3058.

251. Act of Dec. 22, 1987, Pub. L. No. 100-202, 101 Stat. 1329, 1329-142, 1329-148, 1329-170. *See* Felton, *Foreign Aid Funding Escapes Drastic Cutbacks*, 1987 CONG. Q. WEEKLY REP. 3200.

a memorandum to President Reagan concluding that the Pakistani Government was involved in the smuggling activities of Arshad Pervez. The memorandum recommended to President Reagan that he waive the Solarz Amendment, otherwise United States aid would have to be terminated.[252] The State Department's conclusion that Pervez was acting on behalf of Pakistan was one of five tests that had to have been satisfied before President Reagan could find a violation of the Solarz Amendment. The other tests were that Pakistan did not currently possess nuclear weapons; that the illegal export or attempt to export actually took place, which occurred on or after August 8, 1985; that the material would contribute significantly an ability to manufacture a nuclear device; and that Pakistan was to have used the material for that purpose.[253]

On January 15, 1988, President Reagan determined that "material, equipment, or technology covered by that provision [the Solarz Amendment] was to be used by Pakistan in the manufacture of a nuclear explosive device."[254] President Reagan then immediately waived the termination of United States assistance required by his determination. He certified under section 670(a)(2) of the Foreign Assistance Act that "not providing assistance . . . [to Pakistan] would be seriously prejudicial to the achievement of United States nonproliferation objectives and otherwise jeopardize the common defense and security."[255] Following the waiver of the Solarz Amendment, President Reagan proceeded to waive section 669, relating to nuclear enrichment transfers, of the Act until April 1, 1990.[256]

The Reagan Administration justified the waiver on the basis that continuation of United States aid to Pakistan was "vital to demonstrate U.S. resolve to resist Soviet aggression" and termination of United States aid "would undermine efforts to bring about a Soviet withdrawal from Afghanistan, place in doubt the credibility of established U.S. security commitments, and jeopardize important U.S. security interests throughout the region."[257] The Administration also stated Pakistan had pledged

252. Shipler, *State Dept. Links Pakistan to Atom Shipping Plot*, N.Y. Times, Jan. 14, 1988, at A3, col. 1.

253. 22 U.S.C. § 2429a(a)(1) (Supp. IV 1986). *See* Shipler, *supra* note 252, at A3.

254. Presidential Determination 88-5, 53 Fed. Reg. 3325 (1988). *See* Wimes, *Reagan Agrees to Continued Aid to Pakistan*, Los Angeles Times, Jan. 16, 1988, Pt. I, at 8, col. 1.

255. Presidential Determination 88-5, 53 Fed. Reg. 3325 (1988).

256. *Id.*

257. The White House, Justification For Presidential Determination To Authorize Security Assistance For Pakistan 1 (Jan. 15, 1988) (press release) [hereinafter Justification]. *See* White House Statement on the Continuation of Aid to Pakistan, 24 WEEKLY COMP. PRES. DOC. 44 (Jan. 15, 1988).

that it would "halt the illegal procurement of US goods for its nuclear program."[258] An additional, though not officially stated, reason for the two Presidential waivers was the fear that Pakistan would respond to an aid cutoff by severing the United States aid pipeline to the Afghan rebels.[259]

Senator Glenn criticized the Administration's action as "only inviting further attempts to [violate United States nuclear nonproliferation] laws, not only by Pakistan, but by other nations with whom we share regional military interests."[260] Yet, even Senator Glenn, one the most knowledgeable members of Congress on nuclear affairs and strongest critics of the Reagan Administration's nonproliferation policies, did not want the United States to end its support for Pakistan. At most, he advocated forcing Pakistan to choose between United States military aid and continued production of fissile material.[261]

Ultimately, there was little chance that critics of unconditional aid to Pakistan would gain the upperhand during 1988. Pakistan was freed from the restrictions of the Symington Amendment until April 1, 1990. Moreover, as the months passed by in 1988, United States nonproliferation policy was dictated less by the debates on Capitol Hill than events occurring outside the United States.

### 11. The Geneva Peace Accord and Election of Benazir Bhutto

On April, 14, 1988, Pakistan, Afghanistan, the Soviet Union and the United States signed accords for the withdrawal of Soviet forces from Afghanistan and for the non-interference and non-intervention in the internal affairs of Pakistan and Afghanistan.[262] As recognized at the time, the accords in no way guaranteed a peaceful future for Afghanistan. The Afghan rebels were not a party to the accords and neither they nor the Soviet forces were required to stop fighting. In addition, none of the agreements mentioned how Afghanistan would be governed in the future.[263]

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258. Justification, *supra* note 257, at 1.

259. *See* Shipler, *supra* note 252, at A3 ("The Administration, depending on Pakistan as a route for supplies to the Afghan guerrillas, has tried to avoid any actions that would anger the Government in Islamabad.").

260. Office of Senator John Glenn, Glenn Criticizes Proposed Loophole for Pakistan (Jan. 15, 1988) (press release).

261. Letter from Senator John Glenn to author (Apr. 14, 1988).

262. *See* Lewis, *Four Nations Sign Accords For Soviet Afghan Pullout; Fierce Fighting Still Likely*, N.Y. Times, Apr. 15, 1988, at A1, col. 6.

263. Felton, *Provisions of the Afghanistan Accord . . . . . From Pullout Date to Refugees' Fate*, 1988 CONG. Q. WEEKLY REP. 994, 995.

Despite predictions that the eventual end of the Soviet occupation of Afghanistan would lead to greater scrutiny by the United States of Pakistan's nuclear program, [264] the Afghanistan settlement locked United States nonproliferation policy on Pakistan in place. The scheduled February 15, 1989 pullout of Soviet troops from Afghanistan and continued Pakistani assistance to the Afghan Mujahideen was foremost on the minds of most members of Congress.[265] Furthermore, following the death of President Zia and United States Ambassador Arnold Raphel in an airplane crash in August, and with Pakistani parliamentary elections scheduled for November, Congress sought to reassure Pakistan of continued United States support.[266] Consequently, Congress appropriated military and economic assistance for Pakistan near the levels requested by President Reagan in his fiscal year 1989 budget.[267]

The November elections presented Pakistan with its first opportunity to achieve democracy in more than a decade.[268] Benazir Bhutto, the daughter of former Prime Minister Zulfikar Bhutto, and her People's Party, emerged as the clear winners in the elections and she became Prime Minister on December 1, 1988.[269] Her election and the restoration of democracy to Pakistan raised hopes that Pakistani-Indian relations would improve.[270] In particular, Benazir Bhutto had criticized the Zia government for pursuing a covert nuclear program[271] and stated that "[w]e certainly don't want nuclear proliferation."[272]

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264. *See* STAFF REPORT, *supra* note 29, at 13; Tefft, *Pakistan-US ties face Afghan test*, Christian Sci. Monitor, Feb. 19, 1988, at 7, col. 1.

265. *See* STAFF REPORT, *supra* note 29, at 13.

266. Felton, *Rare Aid Funding Bill Comes Down to the Wire*, 1988 CONG. Q. WEEKLY REP. 2731, 2738.

267. President Reagan requested $240 million in military aid and $250 million in economic aid for Pakistan. Felton, *Salvador-Aid Issue Re-Emerges in Senate Panel*, 1988 CONG. Q. WEEKLY REP. 1740, 1742. The foreign assistance spending bill passed by Congress provided $215 million in economic aid and $230 million in military aid. Importantly, all of the military assistance was in the form of grants. Act of Oct. 1, 1987, Pub. L. No. 100-461, 102 Stat. 2268, 2268-11, 2268-17. In fiscal year 1987, only $30 million in military aid was in the form a grant, the remainder in the form of a loan. Felton, *Absence of Partisan Bickering Marks Foreign-Aid Funding Bill*, 1988 CONG. Q. WEEKLY REP. 1236, 1237.

268. Weintraub, *Democracy May Be in Pakistan's Grasp*, San Francisco Chron., Nov. 9, 1988, at A14, col. 1.

269. Crossette, *Daughter of Determination*, N.Y. Times, Dec. 2, 1988, at A1, col. 2.

270. The Prime Minister herself stated that "[w]e believe that with the induction of a democratic government, relations [with India] will improve. After all, don't both nations have common problems of poverty and illiteracy? Confrontation does not help." Gupta, *Too Good to be True*, INDIA TODAY, Sept. 15, 1988, at 20, 21 (interview with Prime Minister Benazir Bhutto).

271. STAFF REPORT, supra note 29, at 16.

272. Gupta, *supra* note 270, at 21.

In India, Prime Minister Rajiv Gandhi is known as "the principal opponent within his government to a nuclear weapons program."[273] In June 1988 Prime Minister Gandhi proposed at the United Nations a three tier approach to global nuclear arms control. The plan envisioned the superpowers to reduce their nuclear arsenals. Second-rank nuclear nations, Great Britain, France, and China, would freeze their forces at current levels. Third tier nations, the near-nuclear states such as Argentina, Brazil, Pakistan, and India, would agree to remain nonnuclear.[274]

Of immediate significance, the Gandhi proposal signals that India may now be willing to discuss nuclear affairs bilaterally with Pakistan. Previously, India refused to discuss regional solutions until the superpowers first agreed to arms reductions.[275] Pakistan has repeatedly proposed that India and Pakistan jointly sign the Nuclear Nonproliferation Treaty or declare South Asia a nuclear-weapons-free zone.[276]

At the December 29-31, 1988 meetings of the South Asian Association for Regional Cooperation (SAARC), Prime Ministers Bhutto and Gandhi established an "instant rapport" and signed a treaty not to attack the nuclear facilities of each other's nation.[277] While outstanding problems remain between both nations, especially on nuclear affairs, the SAARC meetings created the possibility of a "fresh start" for India and Pakistan to end their forty years of hostility.[278]

Hardly noticed at all in the aftermath of the November elections in Pakistan and the United States, President Reagan on November 18, 1988 issued the executive certification that "Pakistan does not possess a nuclear explosive device" required for United States assistance to be fur-

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273. STAFF REPORT, *supra* note 29, at 17.

274. *See, e.g., id.* at 21-22; L. Spector, Nuclear Weapons and South Asian Security 15 (Oct. 6, 1988) (remarks before the Southwest Asia Working Group of the National Defense University). At the same United Nations session, Secretary of State George Shultz publicly urged India and Pakistan to sign the Nuclear Nonproliferation Treaty. He stated that " '[t]oday it is in South Asia that the (nuclear) danger is most acute. We encourage the states of South Asia to take concrete steps to meet this urgent challenge.' " *Shultz Asks India, Pakistan to Sign Treaty*, San Francisco Chron., June 14, 1988, at A15, col. 4.

275. STAFF REPORT, *supra* note 29, at 20, 22; L. Spector, *supra* note 274, at 15-16.

276. *Pakistan Offers Nuclear Choices*, N.Y. Times, Apr. 4, 1987, at A26, col. 3 (Letter to the editor from Jamsheed K.A. Marker, Ambassador of Pakistan to the United States). "Prime Minister Junejo said Pakistan would sign the NPT immediately, 'within a day,' if India would do likewise, which is unlikely." King, *supra* note 221, at 11.

277. Ali, *A Hint of Hope*, *supra* note 3, at 10.

278. *Id.* Unfortunately, India and Pakistan, other than signing the agreement not to attack each other's nuclear installations, did not discuss nuclear issues in a regional context. Instead, the issue was debated as a global concern, "a rather futile exercise" in the words of one reporter. McEwen, *Commonwealth Re-entry is Likely Uuder Bhutto*, The Times (London), Jan. 2, 1989, at 7, col. 1.

nished to Pakistan for fiscal year 1989.[279] It was reported that "intelligence information on Pakistan's nuclear weapons programme had become so voluminous that concerned US officials could no longer agree on whether the administration could truthfully provide the certification."[280]

In essence, the decision was a political one. In light of the serious consequences for American-Pakistani relations if President Reagan did not issue the certification, and with the war in Afghanistan still raging, the Reagan Administration decided to leave the resolution of the issue to the new governments in Washington and Islamabad.[281]

## IV. CONCLUSION

The Reagan Administration strongly supported aid for Pakistan as essential to counter the Soviet presence in Afghanistan. Congress, in turn, accepted the Administration's arguments and felt Pakistan should be rewarded for acting as the conduit for United States covert aid to the Afghan rebels and providing sanctuary for three million Afghan refugees.[282] Consequently, the United States declined to impose an aid cutoff as required under the Foreign Assistance Act of 1961. Instead, the United States crafted a series of loopholes in its nonproliferation laws for Pakistan while the former government of President Zia achieved the capability to manufacture a nuclear device.

President Reagan waived, by certification to Congress, three of the four cutoff provisions of the Foreign Assistance Act that apply to all nations which receive United States assistance.[283] On January 15, 1988, he waived until April 1, 1990, section 669, which denies aid to any nation receiving unsafeguarded nuclear enrichment technology.[284] President Reagan indefinitely waived section 670(a)(1)(A), relating to transfers of nuclear reprocessing technology, on February 10, 1982, pursuant to the

279. Presidential Determination No. 89-7, 53 Fed. Reg. 49111 (1988).

280. Chanda, *See No Evil*, FAR E. ECON. REV., Jan. 5, 1989, at 11, 11.

281. *Id.*

282. *See* Madison, *supra* note 148, at 1774.

283. The largest recipient of American assistance, Israel, is covered by the Glenn-Symington Amendments. However, the amendments mandate a cutoff of aid to nations receiving enrichment and reprocessing technology only on or after August 4, 1977. 22 U.S.C. §§ 2429(a)-2429a(a) (1982 & Supp. IV 1986). Israel either has built indigenous nuclear facilities or received enrichment and reprocessing technology from foreign suppliers before August 4, 1977. *See* L. SPECTOR, *supra* note 3, at 146-47. *See generally* TASK FORCE, *supra* note 6, at 5.

284. Presidential Determination 88-5, 53 Fed. Reg. 3325 (1988). Congress provided President Reagan the authority to waive section 669 as part of 1987 aid package for Pakistan. 22 U.S.C.A. § 2375(d) (West Supp. 1988).

"built in" certification provision of section 670(a)(2) of the Act.[285] Also, pursuant to section 670(a)(2), the President waived Section 670(a)(1)(B), the Solarz Amendment, on January 15, 1988.[286] The waiver of the Solarz Amendment applied only retroactively to Arshad Pervez's activities on behalf of Pakistan. A waiver of the remaining cutoff provision, section 670(b), has not been considered since it penalizes nations involved in the transfer or detonation of nuclear weapons by NNWS.[287] Pakistan has neither received nor tested a nuclear weapon.

The certification requirement on possession of a nuclear device is a provision within the Foreign Assistance Act specific to Pakistan.[288] President Reagan conveyed the certification to Congress for fiscal years 1986 through 1989.[289]

There is little doubt today that Pakistan could assemble a nuclear weapon in a short period of time.[290] Richard Kennedy, the Reagan Administration's Special Ambassador on Nonproliferation Affairs, admitted in testimony to Congress in October 1987 that Pakistan had enriched uranium above the five percent level.[291] President Reagan determined in January 1988 that the material Arshad Pervez attempted to smuggle out of the United States "was to be used by Pakistan in the manufacture of a nuclear explosive device."[292] Also, President Reagan, in a letter to Congress accompanying his final certification that Pakistan did not possess a nuclear device, said that " 'as Pakistan's nuclear capabilities grow and if evidence of its activities continues to accumulate,' " a future certification may be " 'difficult or impossible to make with any degree of certainty.' "[293]

A basic point that must not be forgotten is that the United States furnished Pakistan several billion dollars in economic and military assistance during the period that Pakistan achieved the capability to produce nuclear weapons. Moreover, the United States allowed the former gov-

285. Presidential Determination No. 82-7, 3 C.F.R. 241 (1983), *reprinted in* 22 U.S.C.A. § 2375 app. at 206 (West Supp. 1988).

286. Presidential Determination 88-5, 53 Fed. Reg. 3325 (1988).

287. *See* 22 U.S.C. § 2429a(b) (1982).

288. 22 U.S.C. § 2375(e) (Supp. IV 1986).

289. Presidential Determination No. 86-03, 3 C.F.R. 427 (1986), *reprinted in* 22 U.S.C. § 2375(e) app. at 761 (Supp. IV 1986); Presidential Determination No. 87-3, 3 C.F.R. 275 (1987); *reprinted in* 22 U.S.C. § 2375(e) app. at 761 (Supp. IV 1986); Presidential Determination 88-4, 3 C.F.R. 316 (1988); Presidential Determination 89-7, 53 Fed. Reg. 49111 (1988).

290. *See supra* note 5 and accompanying text.

291. *See supra* note 237.

292. Presidential Determination 88-5, 53 Fed. Reg. 3325 (1988).

293. Chanda, *supra* note 280, at 11. *See* Gordon, *German Concern Said to Aid Pakistan A-Weapons*, N.Y. Times, Jan. 29, 1989, at A6, col. 4.

ernment of President Zia to achieve this capability despite President Zia breaking repeated pledges that Pakistan would not develop nuclear weapons, enrich weapons grade uranium, or illegally procure nuclear weapons related technology from the United States.

The events in Afghanistan have critically influenced United States-Pakistani relations for the last decade. The Reagan Administration ultimately decided to do nothing which would threaten the Afghan insurgents at any level. Consequently, the United States leverage over Pakistan was quite limited.[294] Now that Soviet Union has withdrawn its forces from Afghanistan, it is time for the United States to reconsider whether it should continue to subordinate its nonproliferation policy in favor of its strategic interests in South Asia.

Furthermore, United States nonproliferation laws will necessitate a re-examination of United States policy on Pakistan. Congress will have to decide whether to extend the waiver of the Symington Amendment beyond April 1, 1990. Of more pressing concern, the Bush Administration will have to make the difficult decision as to whether it can honestly certify that Pakistan does not possess a nuclear device for fiscal year 1990, which begins on October 1, 1989. To certify that Pakistan does not possess a nuclear device when their scientists are only the "turn of a screw" away from completion makes a mockery of United States proliferation laws and undermines the credibility of the United States. The United States must continue to pressure Pakistan on the nuclear issue.

One policy option for the United States would be to punish Pakistan for its nuclear activities by terminating United States aid and military sales. Neither Congress nor the Bush Administration would support such a proposal, especially in light of Prime Minister Bhutto's favorable statements concerning nonproliferation.[295] Pakistan did receive less funds for fiscal year 1989 than fiscal year 1988, but that was basically attributable to the United States budget deficit and the need to find savings in all areas of the budget.[296]

A review of the history of the nonproliferation regime shows that United States leverage can not stop a nation, with a sufficient technologi-

294. Ebinger Interview, *supra* note 131.

295. President Reagan's fiscal year 1990 budget requested $230 million in military grants and $215 million in economic aid for Pakistan. H.R. Doc. No. 101-4, 101st Cong., 1st Sess. app. I-D2-D3 (1989).

296. Pakistan received $445 million in military and economic aid in fiscal year 1989, as compared to $480 million for fiscal year 1988. One could argue though that Pakistan got a better "deal" with the fiscal year 1989 allotment since all of the military aid was in the form of a grant, rather than a loan. *See supra* notes 251 and 267 and accompanying text.

cal base, determined to pursue the weapons option from obtaining a nuclear device, absent the nation's dependence upon security guarantees from the United States. The previous aid cutoffs by the United States did not halt Pakistan's program.[297] While Pakistan is more dependant on United States foreign assistance today, Pakistan's program has greatly advanced over the last decade and it is doubtful a future aid cutoff would convince Pakistan to disavow the nuclear weapons option.

Although the United States aid program did not alter Pakistan's nuclear intentions, as the Reagan Administration argued it would, United States aid has been one factor contributing to Pakistan's decision not to test a nuclear weapon. The threat of terminating assistance has also effectively prevented Pakistan from reprocessing spent fuel into plutonium. In addition, the United States led an international embargo of commercial nuclear technology against Pakistan, depriving Pakistan of nuclear power reactors it seeks for long-term economic development.[298]

A possible compromise measure would be for Congress to amend the Presidential certification by no longer requiring the President to certify that Pakistan does not possess nuclear weapons. Instead, Congress could revive the 1987 proposed amendment by Representative Solarz. It would have required that the President certify that Pakistan was not enriching uranium above the five percent level, otherwise aid would be cut off.[299]

This approach has the principal advantage of avoiding the dilemma between following the law and terminating United States foreign aid or playing a game of semantics with the word "possession" and continuing assistance. Therefore, it would provide the United States more flexibility in pursuing its nonproliferation policy, without risking a potentially hostile and counterproductive confrontation with Pakistan nor abandoning all leverage over Pakistan's nuclear decisions.

Moreover, an enrichment certification is the most realistic alternative. The United States can not undo what Pakistan has achieved. But if Pakistan were to limit its future enrichment of uranium to the five percent level, Pakistan's nuclear program would come to a standstill. Prime

297. *See* Van Hollen, *supra* note 47, at 161 ("The U.S. experiences with Pakistan regarding the Glenn and Symington Amendments, and with India and the Nuclear Nonproliferation Act, offer a clear message: a highly visible U.S. threat to stop economic assistance, or to cut off nuclear fuel, will not succeed on issues deemed vital to a country's sovereignty and security.").

298. *See generally* STAFF REPORT, *supra* note 29, at 26.

299. *See supra* note 233 and accompanying text. The proposed Solarz amendment itself was modeled after the nonbinding resolutions passed by Congress in July and August 1987 urging Pakistan not to produce weapons-grade nuclear materials. *See supra* note 236 and accompanying text.

Minister Bhutto, in a visit to the United States before the November 1988 elections, indicated her willingness to provide assurances that Pakistan would not develop nuclear weapons. In particular, she noted that "if U.S. intelligence has been able to detect Pakistan's efforts to enrich uranium and acquire bomb components, it presumably would be able to verify a Pakistani pledge not to engage in such activity."[300]

It is important to remember that Pakistan's nuclear program developed out of its rivalry with India and, in response, to India's nuclear activities. India's security concerns are not limited to Pakistan. India sought its nuclear option as a counter to the Chinese bomb. Given India's superiority in conventional arms, there would be little need for India to develop nuclear weapons to defend itself against a nonnuclear Pakistan.[301]

The nuclear future of South Asia lies most directly in the hands of Pakistan and India. The current political climate between India and Pakistan presents the best opportunity in decades to resolve the hostility between the two nations. While India has rejected proposals calling for safeguards on additional nuclear facilities in each nation,[302] bilateral agreements could serve as confidence building measures and reduce "the momentum toward further proliferation."[303]

However, a resolution to the South Asian nuclear challenge can not ignore the threat that China's nuclear forces poses to India.[304] Prime Minister Rajiv Gandhi's December 1988 visit to China was a cautious step toward improving relations between the two nations[305] and may one day contribute toward a regional nonproliferation agreement, which would include China.

The most constructive policy for the United States would be to continue United States assistance to Pakistan while placing a more visible emphasis on nonproliferation policy in its foreign policy. The United States is perceived "as an important actor in the region"[306] and should orchestrate a multilateral diplomatic campaign to convince India and Pakistan to agree to freeze their nuclear programs. The Carnegie Task Force on Non-Proliferation and South Asian Security recommended in January 1988 that the nuclearization of South Asia "deserves [an] inter-

300. STAFF REPORT, *supra* note 29, at 17.

301. *Id.* at 15.

302. *See id.* at 22-24; Letter from Dr. Randy Rydell, professional staff member of the United States Senate Committee on Government Affairs, to author (Feb. 15, 1989).

303. TASK FORCE, *supra* note 6, at 83 (emphasis omitted).

304. *See* STAFF REPORT, *supra* note 29, at 15.

305. Delfs & Manchanda, *Return to Realism*, FAR E. ECON. REV., Jan. 5, 1989, at 10.

306. STAFF REPORT, *supra* note 29, at 26.

national dispute-settlement effort[] on a par with those that have been mounted in recent years to end the Iran-Iraq War, resolve Arab-Israeli differences, and obtain the withdrawal of Soviet forces from Afghanistan."[307] Such an effort, combined with an agreement between Pakistan and India to reciprocal inspections of key nuclear facilities, would represent major progress in averting a South Asian nuclear arms race.

In addition, the United States must be mindful of the global ramifications of a peaceful settlement of the Indo-Pakistani dispute. William Walker and Måns Lönnnroth have called the period between 1983 and 1995 "a testing time for the [Nuclear Nonproliferation Treaty]."[308] One more review conference is scheduled to be held in 1990. Then in 1995, the NPT comes up for renewal. Article X specifies that "[t]wenty-five years after the entry into force of the Treaty, a conference shall be convened to decide whether the Treaty shall continue in force indefinitely, or shall be extended for an additional fixed period or periods. This decision shall be taken by a majority of the Parties to the Treaty."[309] A lessening of the nuclear rivalry between Pakistan and India would reinvigorate the nuclear nonproliferation regime and offer hope that the global community will renew the NPT.

307. TASK FORCE, *supra* note 6, at 108 (emphasis omitted).
308. W. WALKER & M. LÖNNROTH, *supra* note 23, at 125.
309. Nuclear Nonproliferation Treaty, *supra* note 14, art. X, para. 2.